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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 60

THE PENNSYLVANIA RAILROAD COMPANY,
PETITIONER,

vs.

CHARLES E. O'ROURKE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 12, 1952
CERTIORARI GRANTED OCTOBER 13, 1952

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[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES E. O'ROURKE, Plaintiff-Appellant,

against

THE PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellee

STATEMENT UNDER RULE 15(b)

This action was commenced by Charles E. O'Rourke as plaintiff against The Pennsylvania Railroad Company as defendant by the filing of the complaint on the 13th day of September, 1949, in the United States District Court, Eastern District of New York. Service of the summons and a copy of the complaint having been duly made, the defendant served its answer on the 5th day of October, 1949; by stipulation the defendant's answer was amended on the 3rd day of August, 1950. Pursuant to notice duly given, the Deposition of the plaintiff was taken by the defendant on February 8th, 1950.

Pursuant to notice dated May 31, 1951, and based upon the pleadings, the deposition of the plaintiff, the affidavit of A. Harold Frost, Esq., sworn to on the 31st day of May, 1951, and based also upon certain concessions of fact which appear more specifically in the respective affidavits submitted in behalf of each party, the defendant moved for judgment under Rules of Civil Procedure 12b(6), 56b, and 56d. In opposition thereto the plaintiff submitted an affidavit by Herbert Zelenko, Esq., sworn to on the 12th day of June, 1951. The motion having regularly come on to be heard on the 13th day of June, 1951, before Hon. Harold M. Kennedy, United States District Judge, said motion, by decision dated July 12, 1951, was granted on [fol. 2] August 3, 1951, dismissing the complaint and awarding the defendant costs as taxed.

An order having been duly entered, judgment for the defendant, and against the plaintiff, dismissing the complaint, with $48.50 costs, was entered by the Clerk of the

District Court of the United States for the Eastern District of New York on the 9th day of August, 1951.

The plaintiff filed its notice of appeal from the said judgment on the 16th day of August, 1951.

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

Civil Action File No. 10266.

CHARLES E. O'ROURKE, Plaintiff,

against

THE PENNSYLVANIA RAILROAD COMPANY, Defendant.

SUMMONS—September 13, 1949

To the above named Defendant:

You are hereby summoned and required to serve upon Herbert Zelenko, plaintiff's attorney, whose address is One Park Place, New York City, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the [fol. 3] day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

PERCY G. B. GILKES,
Clerk of Court,
By SIDNEY R. FEUER,
Deputy Clerk.
(Seal of Court)

IN UNITED STATES DISTRICT COURT,

[Title omitted]

COMPLAINT

Plaintiff hereby demands a trial by jury

10266

Plaintiff, complaining of the defendant, alleges as follows:

First. That heretofore and at all the times hereinafter mentioned, the defendant was and still is a steam surface railroad corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, and at all the times herein mentioned was and still is doing business within the jurisdiction of this Court.

[fol. 4] Second. That heretofore and at all the times hereinafter mentioned, the defendant carried passengers and freight for hire from the State of New Jersey to other states and from other states to the State of New Jersey, and at all the times herein mentioned was engaged in the business of interstate commerce.

Third. That this action is brought under the Federal Employers' Liability Act and the Safety Appliance Acts.

Fourth. That heretofore and at all the times hereinafter mentioned, defendant maintained, operated and controlled a certain railroad yard known as the Jersey City Yard, at Jersey City, State of New Jersey, which contained the defendant's rails, tracks, switches, sidings, roadbeds, docks, piers and turnouts, over, through and upon which the defendant operated locomotives, engines, trains and cars under its control.

Fifth. That on or about January 28th, 1948, plaintiff was employed by the defendant as a brakeman at the defendant's said Jersey City Yard, at Jersey City, in the State of New Jersey and his duties consisted of classifying, drilling and shifting cars and making up trains and being a brakeman in the general interstate service of the defendant, all in the furtherance of the defendant's business of interstate commerce.

Sixth. That on or about January 28th, 1948, plaintiff was employed by the defendant as a brakeman at the defendant's said Jersey City Yard, at Jersey City, in the State of New Jersey, and was engaged in the defendant's business of interstate commerce.

Seventh. That at the said time as aforesaid, while plaintiff was employed by the defendant as a brakeman at the said place as aforesaid and was performing his duties pur- [fol. 5] suant to the orders, instructions and directions of the defendant, its vice-principal or agent from whom he was obliged to and did take his orders, instructions and directions and while plaintiff was riding a car and attempting to release the brake in the usual and customary manner, suddenly by reason of the negligence and carelessness of the defendant, its agents, servants and employees and without any fault or negligence on the part of the plaintiff contributing thereto, and by reason of the defective, improper and inefficient condition of the said brakes and all the appurtenances connected therewith, the said brake was caused to give and spin in an abnormal and unusual manner and by reason of which plaintiff was precipitated from his position and thrown to the ground and as a result thereof he sustained the severe and permanent injuries hereinafter mentioned.

Eighth. That at the said time and place hereinbefore mentioned, the defendant, its agents, servants and employees were negligent and careless in that they negligently and carelessly maintained the brakes and all the appurtenances connected therewith upon the said car in a defective, improper and inefficient condition in violation of the Acts of Congress known as the Safety Appliance Acts and the rules and regulations of the Interstate Commerce Commission in such cases made and provided and appertaining thereto; in that they negligently and carelessly failed to give the plaintiff any notice or warning of the defective, improper and inefficient condition of the said brakes and all the appurtenances connected therewith; in that they negligently and carelessly failed to properly inspect and repair the defective, improper and inefficient condition of the said brakes and all the appurtenances connected therewith; in that they negligently and carelessly violated the rules, regulations, customs and practices existing at the

said time and place; in that they negligently and care-
[fol. 6] lessly failed to provide plaintiff with a safe place in which to work and to maintain the same in a reasonably safe condition; in that the defendant was negligent and careless in other respects.

Ninth: That as a result of the above-mentioned premises, the plaintiff was severly injured in and about his head, body and limbs; he was injured both internally and externally; he suffered and still suffers great pain and mental anguish; he suffered and still suffers from nervous shock and debility; he will be compelled to expend sums of money for medicines and medical treatments; he has been and will be prevented from attending to his usual work and earning his livelihood, all to his damage in the sum of One hundred thousand and 00/100 ($100,000.00) Dollars.

Wherefore, plaintiff demands judgment against the defendant in the sum of One hundred thousand and 00/100 ($100,000.00) Dollars, besides the costs and disbursements of this action.

Herbert Zelenko, Attorney for Plaintiff,. Office & P. O. Address, One Park Place, Borough of Manhattan, City of New York.

[fol. 7] IN UNITED STATES DISTRICT COURT

ANSWER—October 5, 1949

The defendant answering the complaint herein:

I. Admits the allegations contained in paragraphs numbered "First", "Second" and Fourth" of the complaint.

II. Upon information and belief, denies each and every allegation contained in paragraphs numbered "Third", "Sixth", Seventh", "Eighth" and "Ninth" of the complaint.

III. Admits that on or about January 28, 1948, plaintiff was employed by the defendant as a freight brakeman at its Harsimus Cove Freight Yards, Jersey City, New Jersey, but except as so admitted denies each and every allegation contained in paragraph numbered "Fifth" of the complaint.

IV. Except as hereinbefore admitted or otherwise controverted, denies each and every allegation contained in the complaint.

The defendant further answering and for a first, separate and complete defense to the cause of action, if any, alleged in the complaint, alleges:

V. That the plaintiff was employed by it as a freight brakeman engaged in unloading cars from a car float at the defendant's Harsimus Cove Freight Yards, Jersey City, New Jersey, and that while so employed and while on said car float plaintiff received the injuries, if any, [fol. 8] herein complained of; that at said time there was in full force and effect an act of the Congress of the United States known as Longshoremen's and Harbor Workers' Compensation Act, 1927, and subsequent amendments thereto; that the defendant at the said time had fully complied with the requirements of said Act; that at the said time plaintiff and defendant were within the provisions of said Act; that since the time mentioned in the complaint defendant has paid compensation to plaintiff pursuant to the requirements of said Act; that by reason of the premises plaintiff is not entitled to any recovery in this action.

Wherefore, the defendant asks that the complaint herein be dismissed with costs.

Dated: New York, N. Y., October 5, 1949.

Conboy, Hewitt, O'Brien & Boardman, by Edward F. Butler, Member of Firm, Attorneys for Defendant, 39 Broadway, New York 6, N. Y.

[fol. 9] IN UNITED STATES DISTRICT COURT

STIPULATION AMENDING ANSWER—August 3, 1950

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the defendant's answer be and the same hereby is amended to include the following:

The defendant further answering and for a first, separate

and partial defense to the cause of action, if any, alleged in the complaint, alleges:

VI. That if the plaintiff was injured, as is alleged in the complaint, his own negligence contributed to his injuries, and the defendant did not violate any Statute or Statutes enacted for the safety of its employees.

Dated: New York, N. Y., August 3, 1950.

Herbert Zelenko, Attorney for Plaintiff. Conboy, Hewitt, O'Brien & Boardman, Attorneys for Defendant.

[fol. 10] IN UNITED STATES DISTRICT COURT

DEPOSITION OF THE PLAINTIFF

39 Broadway, New York, N. Y.,
February 8, 1950, 2:00 P. M.

Deposition of the plaintiff taken at the office of Conboy, Hewitt, O'Brien & Boardman, 39 Broadway, New York 6, N. Y., at 2.00 P. M. on February 8, 1950, pursuant to notice dated October 5, 1949, as adjourned to the above time and date by agreement of counsel.

APPEARANCESS

Herbert Zelenko, Esq., Attorney for Plaintiff; Harold L. Schwartz, Esq., of Counsel.

Messrs. Conboy, Hewitt, O'Brien & Boardman, Attorneys for the Defendant; Arthur R. Douglass, Esq., of Counsel.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that sealing, certification and filing of the within deposition be and the same are hereby waived, and that the attorney for the plaintiff shall be furnished with a copy thereof without charge;

It is further stipulated and agreed that the witness may be sworn at the taking of his deposition by any notary pub-[fol. 11] lic of the State of New York, and that the witness may read, sign and swear to his testimony when the same is transcribed before any notary public of the State of New York;

It is further stipulated and agreed that all objections, except as to the form of questions, be and the same are hereby reserved to the trial of the action.

CHARLES E. O'ROURKE, the plaintiff, being first duly sworn, testified as follows:

By Mr. Douglass:

Q. What is your name?
A. Charles E. O'Rourke.
Q. How old are you?
A. 45.
Q. Where do you live?
A. 2112 Dorchester Road, Brooklyn.
Q. Are you married?
A. Yes.
Q. Do you have any children?
A. One.
Q. How long have you lived at 2112 Dorchester Road, Brooklyn?
A. Oh, since 1943 I moved there.
Q. Where did you live before that—in Brooklyn?
A. Oh, yes. I have been in Brooklyn since 1926.
Q. How long have you been working for the Pennsylvania Railroad?
A. Since December, 1942.
Q. What did you do before that?
A. Oh, I drove a truck, chauffeur.
Q. Did you work in New York City?
A. Yes, sir.
Q. Who was your last employer before you worked for the Pennsylvania Railroad?
A. Well, I was working with the loaders on the dock. I worked with a three-man crew.
Q. Do you mean you did stevedoring work?
A. Yes, sir.
[fol. 12] Q. And how long prior to 1942 had you done that sort of work?
A. I was only there about three or four months. Before that I was driving a truck.

Q. Whom did you drive a truck for?

A. John J. Cassell. It was his trucks. John Randalls was the company I worked for.

Q. How long did you work for them?

A. Oh, about five years.

Q. Are they here in New York City?

A. Yes.

Q. When you went to work for the Pennsylvania Railroad in 1942, in what capacity were you hired?

A. Freight brakeman.

Q. Where did you start to work?

A. Jersey City.

Q. Have you always worked at Jersey City?

A. Always, yes.

Q. As a freight brakeman, what sort of work did you do?

A. Drill cars, make up trains.

Q. At the Jersey City Yards?

A. It is known as the cove, H Cove.

Q. Harsimus Cove Yards, Jersey City?

A. Yes.

Q. And have you always worked at Harsimus Cove Yards while you have been working for the railroad?

A. Always, yes—up to the present.

Q. Where are you working now?

A. Penn Station.

Q. New York City?

A. New York City.

Q. And how long have you worked as a freight brakeman in Penn Station?

A. Well, it is considered freight but we handle passenger equipment.

Q. In your work at the Harsimus Cove Yards did you do any work on car floats?

A. Yes.

Q. Did you work on car floats every day?

A. No. I wouldn't say every day, no.

Q. Well, three or four times a week?

A. Well, it depends on the job we had.

Q. From time to time you were required to work on car floats; is that right?

A. Yes.

[fol. 13] Q. And when you worked on these car floats what type of work did you do?

A. Take the hand brakes off.

Q. You took the hand brakes off the freight cars on the car floats; is that correct?

A. Yes, sir.

Q. Freight cars which had come across the river into Harsimus Cove?

A. Yes, sir.

Q. And is it a fair statement to make that you as a member of a drill crew would take these freight cars off the car floats and make them up into a train?

A. That's it—drill them out, pull them out into the yard and drill them.

Q. And what specifically would you have to do with the cars on the car floats?

A. Well, take the handbrakes off.

Q. Take the handbrakes off?

A. Yes.

Q. Did you do anything else?

A. Well, no. One man coupled up. My job was to go over and release the handbrakes.

Q. On the cars on the car floats?

A. Yes, sir.

Q. That, is when you worked on car floats?

A. Yes.

Q. To the best of your recollection is that the only thing you did when you worked on cars on cars floats?

A. It depends on what I wanted to work at. Sometimes I might pull the pin or couple up and sometimes the other fellow might couple up and pull the pin. I had more or less of a conductor's job.

Q. In January of 1948 did you have an accident?

A. Yes.

Q. Was that on January 28?

A. January 28.

Q. What time did you report for duty on that day?

A. 3.59.

Q. P. M. or A. M.?

A. P. M., in the afternoon.

Q. What was your tour of duty?

A. 3.59 to 11.59.

Q. And who was in your crew that day?

A. Well, we had the engineer——

Q. What was his name?

A. Fisher, Carl Fisher. I don't know—I forget the fireman's name. Paddy Kilcullen was the conductor, Roach the brakeman.

[fol. 14] Q. He was the other brakeman?

A. Yes.

Q. So that you had an engineer, a fireman, a conductor, another freight brakeman and yourself?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Did your crew have any designation or number?

A. 32-B.

Q. Had you worked with that crew before?

A. Oh, yes. I was a regular member of that crew.

Q. How long had you worked with those men?

A. A couple of months, I imagine.

Q. Had you worked regularly with them during the two-month period or couple of months prior to January 28, 1948?

A. I just forget because I know I had been on the job. I just forget when I got on.

Q. Was that your regular tour of duty, 3.59 to 11.59 P. M.?

A. That's right.

Q. What was the weather like on January 28, 1948?

A. I forget now. I know it was kind of clear that night.

Q. Had it been snowing at any time during the day?

A. I don't think it did. I don't think it snowed that day. I just couldn't swear yes. I couldn't swear no.

Q. You don't know whether it snowed or rained or whether it was clear that day?

A. No. It did not rain.

Q. Is it your best recollection that if was clear that day?

A. It was clear.

Q. Did there come a time when you were going to move some freight cars from a car float on the night of January 28, 1948?

A. Yes.

Q. About what time was that?

A. Oh, around—I imagine around, between 9.30 and 10.00. I am not sure of the time.

Q. Were those the first freight cars you had taken off a float on that day?

A. No.

Q. You had taken off others?

A. Yes. We had taken off cars from three or four floats.

Q. What had you been doing just before you started to move this particular car off this particular car float be-
[fol. 15] tween 9.30 and 10.00?

A. We went down with an engine and pusher—it is like a flat car—and got the cars off.

Q. Before you started that particular assignment do you recall what your assignment was?

A. We pulled in there before that and we went down to get this other float.

Q. And when you went down to get this other float how did you go down—on the locomotive?

A. No. I went on the pusher. The crew rides the pusher.

Q. When you say pusher, what do you mean?

A. Flat car. You cannot go on the float with an engine. You use this flat car. It is like a regular house.

Q. And that flat car is backed onto the float?

A. Yes, and coupled up.

Q. You went on the car float on the pusher?

A. Yes.

Q. What did you do when you got there?

A. Coupled up, and the conductor went to take the numbers, which it is his duty to take the numbers of the cars, and I got on the car—I went on the top of the car to take the brakes off.

Q. When you say you coupled up the pusher, coupled up to what?

A. The pusher coupled up to the head car on the north side, the box car.

Q. You mean the head box car on the float?

A. Yes.

Mr. Schwartz: On the north side.

Q. How many tracks were there on the float?

A. Two. There is two sets, like one on the north and one on the south.

Q. And the float was tied up to a pier, was it?

A. Tied up, yes.

Q. And when you got down there was the pusher taken onto the float?

A. It was taken onto the float. We had the green light to go in.

Q. In which direction was the float facing—north and south or east and west?

A. East and west.

[fol. 16] Q. And there were two tracks on the float?

A. Yes.

Q. So that the float would have a north side and a south side?

A. North side and south side.

Q. As you went on it to do your work?

A. Yes, sir.

Q. Were there cars on either track?

A. North and south.

Q. There were cars on the north track?

A. Yes.

Q. How many cars were on the north track?

A. Five.

Q. And how many cars were on the south track?

A. Five.

Q. Five on both tracks?

A. Yes. That is ten cars. We had ten cars to pull. It was a ten-car float.

Q. You say the pusher coupled up to the cars on one of the tracks; is that correct, sir?

A. That's right.

Q. To which cars—the cars on the north side or on the south side?

A. On the north side.

Q. Who made that coupling?

A. Well, the three of us was actually there when we done it, see?

Q. Do you recall who actually made the coupling?

A. I think it was Roach who made it.

Q. He was the other brakeman?

A. He was the other brakeman.

Q. After the coupling was made, what did you do?

A. I climbed up on the north side and took the hand brakes off.

Q. And what kind of cars were those on the north side track?

A. Box cars.

Q. They were all box cars?

A. Yes.

Q. And you say you took the brakes off those box cars?

A. On the north side.

Q. How did you walk—from front to rear or rear to front?

A. No. You start from the westward, the front end of the float, and you walk toward the rear, toward the river. You are going towards the river, and you cross over and work back. That is the way.

[fol. 17] Q. So that on the north side track you walked from the front to the rear and when you finished that you walked from the rear to the front on the south track?

A. Yes.

Q. Did you take the brakes off the cars on the north track?

A. Yes, sir.

Q. And did you get them all off?

A. They all came off.

Q. Do you recall what type of brakes they were on the box cars on the north side?

A. They were brakes, stem winders and Ajax, both.

Q. You don't recall?

A. No.

Q. But you do remember they were different kinds?

A. Yes.

Q. Did you have a brake club with you?

A. No. I had one on the pusher, but we very seldom use it.

Q. You did not carry it with you when you took the brakes off the cars on the north side track?

A. No, sir.

Q. Did you have a light with you?

A. Yes.

Q. What kind of a light?

A. An electric lamp. The company supplies that.

Q. And did you have anything else with you?
A. That's all.
Q. Were you wearing gloves?
A. Wearing gloves.
Q. Was it cold?
A. Well, it was kind of cold, cold enough to wear gloves.
Q. Now, while you were taking the brakes off the cars on the north side track what was your conductor doing?
A. Taking the numbers.
Q. You mean he was going along the south side?
A. No. He goes along the platform in the middle.
Q. He was taking the numbers of the cars and putting them down on a piece of paper?
A. That's right.
Q. Between the two tracks there is a platform, is there not?
A. Yes.
Q. What was the other brakeman doing, Roach?
A. He was in the pusher getting warm.
[fol. 18] Q. What was his assignment to be? What was he going to do?
A. The next move was he backs up the north side, throws the switch, and then starts the engine and the crew back, and we make the move over on the south side.
Q. How do you know he was in the pusher when you were taking the brakes off the cars?
A. Because when I went upstairs, climbed up, I saw him there.
Q. Did you leave him in the pusher?
A. I left him in the pusher.
Q. The pusher has an enclosed cabin, has it?
A. In the middle.
Q. And you don't know whether he stayed in there all the time you were taking the brakes off the cars on the north side, do you?
A. No. He was in there when I went up, though.
Q. Now, after you finished releasing the brakes on the last car on the north track, what did you do?
A. I went over to the south side, you see, what you call an apron, you know, like an umbrella. You can go from one car over under the umbrella and step to the other side.
Q. Where is the apron or umbrella—on the ground?

A. Yes. It is built over the platform. Here is the platform. You have what you call an umbrella or what we call an apron.

Q. And how high is it?

A. Even with the top of the box cars.

Q. And it is directly over the platform which runs down the middle of the float between the two tracks?

A. Yes.

Q. Is it metal?

A. That one is metal; some is wood.

Q. You went from the last car on the north side to the last car on the south side; is that correct?

A. Yes.

Q. And you released the brake on the last car on the south track?

A. Yes.

Q. By the way, how did you go when you went from car to car? You didn't climb down, did you?

A. Yes. You have to. There is a little platform the [fol. 19] dog is on. The only time you don't climb down is if it is an Ajax.

Q. I mean, having released the brake on one car, how did you get to the next car?

A. You walk over to the next car.

Q. You don't climb down the ladder, do you?

A. No. You usually walk along what you call the apron or umbrella. You can step from one car to the other.

Q. Then after you released the brakes or brake on the last car on the north side you went to the brakes on the last car on the south side; is that right?

A. Yes.

Q. Where was that brake located, on the east end of the car or the west end of the car?

A. On the north.

Q. Let me ask you this: Was it located towards the rear of the float or the front of the float as it was moored to the dock?

A. That is one thing I cannot answer. I don't remember that far back.

Q. After you finished releasing the brake on the last car, you went to the second car?

A. The second car.

Q. The second from the last?

A. Yes.

Q. Did you have to walk the length of that car before you got to the brake or was the brake at the end of the car where you stepped from the last car to the next to the last car?

A. I don't remember that far back.

Q. When you got onto the next to the last car on the south track, what did you do?

A. I tried to release the brakes.

Q. What kind of a car was it—box car?

A. Box car.

Q. What type of brake did it have?

(Colloquy off the record.)

Q. You released the brakes on the next to the last car?

A. Yes.

Q. And then you got on the next car and released the brakes on the next car?

A. Yes.

Q. And then did there come a time when you got to the——

A. Third.

[fol. 20] Q. —third car from the rear or second car from the front?

A. Yes, and then I walked to the west end of it.

Q. You walked to the west end of the second car from the front; is that correct?

A. Yes.

Q. That would be the end closest to the front of the float as it was moored at the pier?

A. Yes.

Q. And did you walk along the top of that car or did you walk along the apron?

A. I walked along the apron and then I stepped on the car.

Q. On the west end?

A. On the west end. There is a space about that much where there is grab irons. I stepped down there and went down on the ladder.

Q. You went down on the side ladder?

A. There is one on the front. You can't go down on the side because the apron is too close.

Q. The end ladder?

A. Yes.

Q. West end ladder?

A. Yes.

Q. Was that the ladder closest to the apron?

A. Yes.

Q. By the way, were there two ladders on the west end of the car or just one?

A. There is one on the north side of the car and one on the south side.

Q. I am talking about the end of the car. There was only one ladder on the end?

A. Yes, and that was next to the apron.

Q. That was closest to the apron?

A. Yes.

Q. On the west end of the car, and you remember starting to climb down off that ladder?

A. I got down off the ladder. There is a little platform you stand on.

Q. The brake platform?

A. Yes.

Q. How far below the top of the car was the brake platform?

A. I imagine a little higher than this desk.

Q. About three feet?

A. I imagine something like that. They are always standard.

Q. Was the brake platform on the north side or the south side of the car?

A. The north side.

[fol. 21] Q. The same side as the ladder on the west end?

A. Yes.

Q. What type of brake was it?

A. Stem winder.

Q. You mean a wheel and staff brake?

A. Yes, sir.

Q. With respect to the roof of the car, where was the brake wheel located?

A. About that high off the roof.

Mr. Schwartz: You mean it was above the roof of the car?
The Witness: A little bit.
Mr. Schwartz: Seven or eight inches, Mr. Douglass?
The Witness: I was standing like this.
Mr. Douglass: About ten or twelve inches.
The Witness: I imagine like that. You see, some of them stick way up like this, and this one was about like that.

Q. About eight to twelve inches above the roof of the car?
A. Yes.
Q. Now, did you have your lantern with you at that time?
A. Oh, yes.
Q. Where were you carrying the lantern?
A. On my arm. I always carried it there.
Q. Which arm?
A. The left one.
Q. Left arm?
A. Yes.
Q. The crook of your elbow?
A. The crook of my elbow.
Q. And you didn't have any brake club?
A. No.
Q. Before you started to release this brake what position did you take on the platform?
A. I was standing there and I braced myself and I grabbed ahold of the wheel.
Q. In which direction were you facing?
A. I would be facing east.
Q. And was the brake wheel right in front of you?
A. Right in front of me.
Q. And were your feet on either side of the brake stem?
A. Yes.

[fol. 22] Q. Do you mean by that that you straddled the brake stem but your feet were on a line—
A. Like even, like this.
Q. With respect to your body, where was the brake wheel before you started to release the brake? I mean by that how high up on your body was it? Was it even with your chest or stomach?
A. About here.
Q. About your chest?
A. About my chest. Maybe a little below.

Q. Now, how did you release this brake? How did you start to release it?

A. You have to get a grip on it.

Q. You took a grip with both hands?

A. Yes. There is a little dog down there. You have to release the dog when you pull it. You have to give it a little twist like this so that you can release it. The dog wouldn't release, and so I just let go for a second, and when I gave it a second twist she went on me, and then I lost my balance and went.

Q. You put both hands on the brake wheel?

A. Yes.

Q. And the next thing you did was to kick out the dog; is that correct, sir?

A. You release it.

Q. The dog fits into the teeth of a ratchet; is that right?

A. Yes. You can only kick it with your foot.

Q. Which foot did you use to kick out the dog?

A. The left.

Q. Before you kicked out the dog did you exert any pressure on the wheel?

A. I did.

Q. Before you kicked out the dog?

A. Yes.

Q. Did the wheel turn at all?

A. Didn't even budge.

Q. This was before you kicked out the dog?

A. Yes.

Q. Did you kick out the dog?

A. I must have kicked it out because when I gave the second pull and it threw me that is how I went, and the wheel spun around.

Q. You say you put both hands on the wheel and exerted pressure on the wheel in which direction—clockwise?

A. Clockwise.

[fol. 23] Q. And the wheel wouldn't turn?

A. Wouldn't turn the first time.

Q. Before you did that did you try to kick out the dog?

A. No. We never try to kick the dog out first. We always make it a habit of trying your wheel.

Q. When you found that the wheel wouldn't turn, what did you do?

A. I got another grip on it.
Q. You exerted more pressure?
A. More pressure on it.
Q. Did the wheel then turn?
A. That is when she gives a sudden jerk on me.
Q. You mean it gave a sudden jerk?
A. Yes.
Q. In which direction?
A. This way.

Mr. Schwartz: Clockwise. That is when I lost my balance.

Q. Where was your left foot at that time?
A. They were both on that little platform. You see, the platform is only about that long.
Q. Had you tried to kick out the dog?
A. I can't remember that because, you see, when we get there we put our foot like that by the dog. We always do that.
Q. Under the custom and practice when you attempt to release a brake of this type when do you kick out the dog?
A. Sometimes it ain't even on there. It all depends. Sometimes the dog ain't even in.
Q. Was this dog in?
A. I think it was. I wouldn't swear to it.
Q. Let me ask you again, Mr. O'Rourke: Under the custom and practice when you are releasing what you call a stem winder brake when do you kick out the dog?
A. After you put pressure on.
Q. After you move the wheel clockwise?
A. You are supposed to move the wheel first; otherwise she is in that groove tight, and, naturally you can't kick that dog out.
[fol. 24] Q. And you say that after first applying pressure the wheel did not turn; is that right?
A. That's correct.
Q. And then you got another grip on the wheel and applied pressure in a clockwise direction and the wheel suddenly turned?
A. Yes.
Q. In a clockwise direction?
A. Do you call that clockwise direction? Yes.
Q. How much of a turn?

A. Oh, I don't——

Q. A quarter of a turn of the wheel?

A. I don't say that.

Q. More than a quarter of a turn of the wheel?

A. That I can't say anyhow, because I went so quick.

Q. Well, was it a quarter; was it at least a quarter of a turn——

A. It must be, yes.

Q. —or was it half a turn?

A. Let us see. I was standing like this when she went like that. That was at least——

Q. Do you know what I mean by half a turn of the wheel?

A. Halfway around?

Q. A full turn of the wheel would be——

A. Like this, you mean—like that to make a complete turn?

A. That's right.

(Colloquy off the record.)

The Witness: She went at least a good quarter of a turn or better.

Q. So that to the best of your recollection the wheel turned in a clockwise direction at least a quarter of a turn?

A. Yes.

Q. Did it move as much as half a turn?

A. That I don't know because I went down so quick.

Q. Well, you don't know then whether it moved half a turn? You don't remember?

A. I don't remember. It is a couple of years ago.

Q. After it moved suddenly, as you say, in a clockwise direction, what happened?

A. I just went down. I landed on the platform.

[fol. 25] Q. What happened to the wheel? Did it continue to go in a clockwise direction?

A. No. It spun back.

Q. You mean it turned suddenly in the other direction?

A. Yes.

Q. Did you still have your hands on the wheel when it started to turn in the other direction?

A. Not that I know of. I don't think so—not that I know of, because when it spun that is when I lost my balance

and I went. No. I don't think I had my hand on it at the minute it went into reverse.

Q. Did you release your grip on the wheel when it turned in a clockwise direction or when it started to turn in the other direction?

A. I just can't remember now. The only thing I know, when it spun me like this that is when it threw me off balance and I went.

Q. You mean when it turned in a clockwise direction it threw you off balance?

A. Yes.

Q. But you don't remember whether you had your hands on the wheel when it started to turn in a counterclockwise direction?

A. No.

Q. And you don't remember whether or not you kicked the dog out?

A. No.

Q. Before you started to exert stress on the wheel in a clockwise direction did you look to see whether the dog was in the ratchet?

A. No. I did not.

Q. You did not?

A. No.

Q. When you lost your balance, what happened?

A. I just went down, went in between the two cars. I landed on the platform.

Q. Between what two cars?

A. The car I was taking the brake off and the head car.

Q. You landed on the platform?

A. Yes.

Q. You didn't actually land between the two cars themselves did you?

A. Well, here is the position I landed. Here is the car coupled up. I fell from this one and when I landed I landed this way, my feet in between what you call the pit.

[fol. 26] Q. And you landed on the platform; is that correct?

A. Yes.

Q. Was your entire body on the platform?

A. No. This here, the cheek here—that is all. I must have grabbed on the way down.

Q. The buttocks?

A. Yes, because I had two little bruises right there on the buttocks.

Q. Where were your legs?

A. They were hanging down in between off the platform. Like, say, this is the platform. They were hanging down here.

Q. How much higher than the tracks is the platform?

A. The tracks is lower than the platform.

Q. Yes, but how much higher than the tracks is the platform?

A. It comes about even with the door.

Q. Of a freight car?

A. Yes.

Q. Would you say it was about three or four feet above the tracks?

A. Something like that, yes.

Q. You didn't fall off the platform, did you?

A. No. I grabbed the bottom rung there. That saved me.

Q. The bottom rung of what?

A. Of the car. That saved me from going into the knuckles.

Q. By bottom rung are you referring to the ladder?

A. One of the ladder rungs.

Q. Which ladder?

A. On the car I fell off.

Q. Are you referring to the ladder on the side of the car or on the end of the car?

A. The end.

Q. That is the ladder on the west end of the car close to the platform?

A. Yes.

Q. You say you grabbed one of the rungs of that ladder on the west end of the car?

A. Yes. That is when the conductor saw me there.

Q. And at that time your buttocks were on the platform?

A. Yes.

Q. And your legs were hanging over the edge of the platform between the cars?

A. Yes.

Q. Did you grab this rung with both hands?

A. Yes.

[fol. 27] Q. Both your right hand and left hand?

A. Both. I grabbed quick, and then I eased down into the—I eased off the platform down to the pit.

Q. You say the conductor saw you?

A. After I fell.

Q. Did you see him?

A. Yes.

Q. When did you see him?

A. Right there. He just passed me by as I came down.

Q. Was there any ice on any of the cars?

A. I imagine there was a little snow on some of them.

Q. Do you remember whether there was any ice on any of the cars?

A. No.

Q. You don't remember?

A. No.

Q. You say you imagine there was a little snow?

A. Well, some cars that were coming in, they had snow.

Q. I am talking about these cars.

A. I don't know about the ones I was on.

Q. I am talking about these cars on which you were working that night.

A. That I couldn't say.

Q. I mean the cars you were working on on this particular car float, do you recall whether there was any ice on any of those cars?

A. There was no ice.

Q. There was no ice?

A. There was no ice, no.

Q. Now, at the time you were working on the cars on the south track was the locomotive or the pusher car attached to that cut of cars?

A. No.

Q. It was still attached to the cars on the north track; is that correct?

A. Yes, sir.

Q. At the time you were attempting to release the brake on this car which was the second from the front was there any movement of the cars?

A. No.

Q. What did you do after the conductor came along?

A. He told me to go up in the pusher. I went to the pusher.

Q. Was Roach there?

A. Roach was in there and he asked what was wrong.

Q. What did you do then?

A. I just stayed in the pusher and waited until they pulled [fol. 28] the float, and then they went up to Number Ten office where they put the cars. They continued to pull the float, and by that time they had an ambulance and the doctor there. Then is when he ordered me to the hospital.

Q. You were taken to the hospital?

A. Yes—St. Francis.

Q. How long were you there?

A. I was there about five days, I think, the whole total.

Q. Who took care of you while you were there?

A. Dr. Brick.

Q. How long were you away from work?

A. The first time 28 days.

Q. What do you mean by the first time?

A. I was off 28 days.

Q. And then you went back to work?

A. Then I went to work and started to lose a lot of time.

Q. Who was treating you during the first 28 days you were away?

A. Penn Station.

Q. You mean the company doctor at Penn Station?

A. Company doctor.

Q. Is that right?

A. Yes. I went there three times a week.

Q. You went back to work after you were out for 28 days?

A. Yes. He told me to go to work; so I took him at his word.

Q. Did you go back to work?

A. Yes. I went back.

Q. And then you say you lost some time after that?

A. Yes. I used to work a day or two and then had to stay off.

(Colloquy off the record.)

Q. You say you lost time after you went back to work?

A. Yes.

Q. Why was that?

A. I kept getting pains in the back, and my legs getting numb.

Q. Where?

A. In the base of my spine.

[fol. 29] Q. In the base of the spine—in the middle of the back?

A. No. In the middle of the leg down, and my legs were getting numb all the time.

Q. Did there come a time when you went back to the hospital?

A. No.

Q. You never went back to the hospital?

A. Not on my own account. I went to see the doctor myself.

Q. Did you go back at some time to a hospital?

A. No. Not until they ordered me to Cornell's office.

Q. Were you sent to a hospital then?

A. Yes.

Q. And an operation performed?

A. Yes.

Q. When did you return to work?

A. May 16.

Q. 1949?

A. 1949. I was off nine months.

Q. Have you continued to work steadily since that time?

A. No. When I went back to Jersey City I lost time again. Why did you lose time?

A. I used to get numb from here down, from here bending.

Q. From the waist down?

A. Yes, and my arms got numb on me, too, even today.

Q. You went to Jersey City after you went back to work the second time?

A. After the operation.

Q. And how long did you work at Jersey City?

A. I forget now. I was there, I think, a month. Anyway, it could not be more than three months.

Q. And then were you transferred?

A. No. I got bumped. You see, they were supposed to create a suitable duty for me, which they never done, and naturally when my turn come to get bumped I got bumped; so I was told to try the station, that I could qualify in the station—it is easier work—so I done that.

Q. And you are working in Penn Station now?
A. Yes, but I worked Sunnyside for a while.
Q. You mean after you left Jersey City?
A. Yes.
Q. You worked at Sunnyside?
A. Yes.
Q. For how long?
A. I imagine a month or so, and then I went to Penn Station.
[fol. 30] Q. Then you went over to Penn Station?
A. Yes. You see, it is all ground work over there.
Q. Since you returned to work after your operation have you lost any time?
A. Well, I took off. You mean after the operation—in Jersey City? Yes.

Mr. Schwartz: No, no. Mr. Douglass means primarily at Penn Station, Mr. O'Rourke.

Q. At Penn Station after you returned to work?
A. Yes. I used to call up and ask whether I could hit the relief, see.
Q. Anyway, you are working at Penn Station now?
A. Yes.
Q. As a brakeman?
A. Yes.
Q. At the same rate of pay?
A. Sometimes as a conductor. It all depends.
Q. Have you received any increase in pay since the accident?
A. No.
Q. Have you received any decrease in pay since the accident?
A. No.
Q. Are you having pains now?
A. Yes. It is not pain—more like burning feeling.
Q. Where?
A. Right where I had the operation.
Q. In the lower part of the spine?
A. Yes.
Q. Are you having any other pain?
A. The leg gets numb and my arms.
Q. Which leg gets numb?

A. Both of them—mostly the left.
Q. All the time?
A. No—not all the time, but off and on.
Q. You have a numb sensation off and on?
A. Yes.
Q. How often and how long do you have that?
A. Mostly at home.
Q. Every day?
A. Every day. If I sit too long I get it, and as long as I keep moving I am all right. That is why Dr. Cornell told me to exercise the muscles all the time.
[fol. 31] Q. You say your arms get numb?
A. Yes. Today I came home this morning and lay in bed for a while, and I had the pain. I didn't get undressed. I just lay down, and my arms when I fell asleep were like this, and when I woke up they were numb. I had to gradually force them down.
Q. How often do you get that numb feeling?
A. Any time I get them like this.
Q. When you get them folded across your body?
A. No. If I don't use them—if I hold them up too high, and every so often I have to use Bromo Seltzer.
Q. Why?
A. My stomach. I can't eat.
Q. How often do you get that?
A. Once a month, and it will last two or three days. Sometimes maybe every two weeks I get it.
Q. Your stomach is upset?
A. Yes. It happened this morning.
Q. When did this start—right after the operation?
A. No. It didn't. After I got home, and I told Dr. Brick about it, and he said it is the reaction from the accident. I didn't think it would still affect me after the operation.
Q. Are you having any other difficulties?
A. I have headaches once in a while, too.
Q. Are you dizzy?
A. Sometimes I get a dizzy spell.
Q. How often do you have headaches?
A. When I get this feeling that I want to throw up. I usually get a little headache first and a little headache after.
Q. Did you ever have headache before the accident?

A. No.

Q. Never had a headache before the accident?

A. Unless I had a smack in the jaw or something like that.

Q. You never had a headache before the accident?

A. No.

Q. Never?

A. Not that I can remember. I never went to doctors.

Q. Were you ever sick to your stomach before the accident?

A. Well, yes. I had my appendix removed.

[fol. 32] Q. You say you get dizzy now and then?

A. Yes.

Q. How often?

A. When I get this feeling—like this morning I am sitting on the engine and we are making a move, and they only had two men out; so I was sitting on the engine. We were moving cars. That was my duty and we went to get coupled up. I threw up two or three times.

Q. When you get these nauseous spells do you throw up?

A. Yes.

Q. Always?

A. No. I done it this morning. I heaved. I couldn't get it up yesterday. I don't know why.

Q. Sometimes when you get those dizzy spells do you throw up?

A. Sometimes.

Q. And you never threw up before the accident?

A. No—not unless I had a jag on, when I took a drink once in a while.

Q. Are you having any other difficulties other than those mentioned?

A. Not that I know of.

Q. Were you ever in a hospital before?

A. Just for appendicitis, and I got circumcised.

Q. Only for your appendix?

A. Yes.

Q. Were you ever in a hospital before you were in the New York Hospital—that is where you were, is it not?

A. Oh, yes. I was in the hospital when I had my hands burned.

Q. When was that?

A. The early thirties. Gasoline burned my hands.

Q. Where were you working then?

A. I was just helping a friend of mine. He was going out of business.

Q. You were in the hospital for that accident?

A. Yes. Well, he took me up. They had to bandage me up with some gooey stuff.

Q. Did you ever have any other accidents while working anywhere?

A. Yes, sir. Oh, I had one, yes.

Q. Where was that?

A. Dr. Orlov knows about it. It was in the back, too, but he said it was lumbago.

[fol. 33] Q. When was that?

A. A couple of years before this one.

Q. Sometime in 1946?

A. Yes.

Q. What happened to you?

A. I went to throw a switch.

Q. You threw a switch?

A. I went to throw a switch over and it was stuck and when I forced it I got a pain in the back, and he just taped me up and said it was lumbago or a sprain or something.

Q. Where were you working then?

A. Waldo, Jersey City.

Q. Did you lose any time?

A. Yes.

Q. How much time?

A. Five days. I went back to work that day and I think I lost five more—nine or ten days.

Q. Did you see any doctors besides Dr. Orlov?

A. No.

Q. Are you being treated by any doctor now?

A. No.

Q. When was the last time you saw a doctor?

A. The last time I was to Dr. Cornell, I haven't got the date.

Q. Dr. Cornell was the last doctor you have seen?

A. Yes.

Q. Were you examined by a doctor for the Compensation Board here in New York?

A. Yes.

Q. Dr. Kennedy?
A. Don't mention that guy to me, please.
Q. Was that the doctor?
A. Yes. No. There was no one. They sent me then to the Mercy Hospital to take X-rays.
Q. You were examined at the Mercy Hospital?
A. Yes. They took X-rays, and a week after I went back and met this doctor—I forget his name. He examined me.
Q. While you were away from work did the railroad send you any checks?
A. These nine months I was off?
Q. Yes.
A. Yes. I got relief checks, you know, from the relief department.
Q. Voluntary relief department checks?
A. Yes.
Q. Did you get any other checks?
A. I got $50 every 14 days.
[fol: 34] Q. What did you do with those checks?
A. I just lived on them.
Q. Cashed them?
A. Sure, except the second one they sent me—I didn't get the second one until I went there, and then I got the second one, and they put it down as dead. Yes. They sent it to me every 14 days, I believe it was.
Q. You were not in the Army or the Navy or the Marines, were you?
A. Yes. I was in the Army.
Q. When did you go in the Army?
A. 1942. I was only in about five months.
Q. 1942?
A. Yes—March.
Q. Were you overseas?
A. No. I went as far as Fort Jackson.
Q. Fort Jackson, South Carolina?
A. Yes, sir.
Q. What branch of the service were you in?
A. Infantry—motorized.
Q. Motorized infantry?
A. Yes.
Q. Were you assigned to a division?

A. The 77th. They had mostly all young fellows, and they got rid of those that were a little too old.

Q. How long were you in the Army?

A. A little over five months.

Q. You were honorably discharged, I assume?

A. Yes.

Q. Why were you discharged?

A. They wanted young stuff in there. They were going to go overseas. They had most of them, 20, 22.

Q. How old were you when you were discharged?

A. About—that was about forty—two, I will say. This is 1950. I will be 46 in June.

Q. And when were you discharged?

A. In 1942.

Q. So you were about 38?

A. Yes.

Q. Do you know why you were discharged? Did you have a physical examination before you were discharged?

A. Oh, yes, everybody does.

[fol. 35] Q. Do you have a copy of your discharge certificate?

A. No. I did have it but I was held up and robbed and I had my railroad pass and everything was stole.

Q. Were you released from service at Fort Jackson?

A. Yes.

Q. You were not sent to Fort Dix?

A. No.

Q. You were released directly from Fort Jackson?

A. Yes.

Q. And you came home from Fort Jackson?

A. Yes, and I took a job with the Government but didn't like it.

Q. You don't have any children living with you?

A. No. He is married.

Q. How long is he married?

A. Four years.

Q. Was he in the service?

A. He was in the Navy.

Q. Do you know when he went into the Navy?

A. About 1943, I believe. He was in a year.

Q. Were you drafted or did you volunteer?

A. No. I volunteered. I wanted to be a hero.

Q. Was your wife working while you were in the service?

A. No. Yes. At the time she was, yes.

Q. She was working when you volunteered?

A. Yes. I went down and told them I was single. I had an argument with her. They kept teasing me, saying, "Oh, you are too old. They will not take you." My kid brother was in the Navy at the time. He was just kidding me and I just showed them they would take me.

Mr. Douglass: That is all.

Mr. Schwartz: Mr. Douglass, I would like to make certain requests, one being for copies of the hospital records of both hospitals that Mr. O'Rourke was in, and also copies of any reports of Doctors Orlov and Cornell, and I should also like to have copies of any statements given by Mr. O'Rourke and any of the members of the crew or other witnesses to the accident.

[fol. 36] Mr. Douglass: What type of statements do you mean?

Mr. Schwartz: Any kind.

Mr. Douglass: You want copies of any statements given by any member or members of the crew, no matter to whom they were given?

Mr. Schwartz: That's correct.

Mr. Douglass: You are referring to either operating department or claim agent's statements?

Mr. Schwartz: Yes.

Mr. Douglass: I will furnish you with copies of operating department statements. I will give you a copy of Mr. O'Rourke's statement or statements, and I decline to furnish you with copies of claim agents' statements taken from other employees.

Charles E. O'Rourke.

Subscribed and sworn to before me this 6th day of September, 1950. Richard C. Machcinski, Notary Public, State of New York. Qualified in Westchester County. No. 60-2527875. Certs. filed with New York and Kings Co. Clerk's and Register's Offices. Commission Expires March 3[illegible] 51.

[fol. 37] IN UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT FOR THE DEFENDANT UNDER RULES OF FEDERAL PROCEDURE 12b(6), 56b, 56d.—May 31, 1951

Sir:

Please take notice that upon the annexed affidavit of A. Harold Frost duly verified the 31st day of May, 1951, and that part of the deposition of the plaintiff with specific regard to the locus of the accident, and the concessions and admissions, and upon the complaint and answer, and upon all of the prior proceedings, the undersigned will move, on the papers herein and by speaking motion, before the Honorable Harold M. Kennedy, one of the Judges of this Court, at his Court in the Courthouse thereof, Room 735, on the 14th day of June, 1951, at 10.30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order granting the defendant judgment pursuant to Rules 12(b)(6), and 56b, and 56d of the Federal Rules of Civil Procedure, on the ground that there is no genuine issue as to any of the material facts with respect to the alleged legal liability of the defendant, and that the defendant is entitled to judgment as a matter of law.

The specific ground for the defendant's motion is as follows:

(1) From the complaint and the locus of the accident as established by the plaintiff in his deposition, and the concessions and admissions, it is conclusively established that the plaintiff's exclusive remedy to recover for personal injuries incurred while employed by the defendant, is under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901, et seq.

[fol. 38] And, for a further order granting either of the parties a certificate certifying the right to appeal from the order entered herein as if the same were a final order of this Court.

Dated: New York, N. Y., May 31st, 1951.

Yours, etc., A. Harold Frost, Trial Counsel for Defendant, Office & P. O. Address, 11 West 42nd

Street, Borough of Manhattan, 18, City of New York.

To Herbert Zelenko, Esq., Attorney for Plaintiff, Office & P. O. Address, One Park Place, Borough of Manhattan 7, City of New York.

[fol. 39] AFFIDAVIT OF A. HAROLD FROST READ IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

A. HAROLD FROST, being duly sworn, deposes and says:

That I am trial counsel for the defendant herein and respectfully make this motion pursuant to the agreement made with the attorney for the plaintiff at a pre-trial conference held before this Court.

The plaintiff, an employee of the defendant; has brought this action under the Acts commonly known as the Federal Employers' Liability Act and the Safety Appliance Act to recover damages as a result of injuries suffered by him during the course of his employment.

Pursuant to agreement, the following papers, concessions and admissions are to be considered in the final determination of this motion:

1. The summons and complaint, and the answer.

2. The testimony of the plaintiff in a deposition conducted on February 8th, 1950 pursuant to the Rules wherein such testimony with respect to the locus of the accident which is the point at issue and the basis of this application concedes the following:

(a) On January 28th, 1948, the plaintiff was employed by the defendant as a freight brakeman at the Harsimus Cove yards of the defendant located at Jersey City, New Jersey.

[fol. 40] (b) That as part of his duties he was required to work on car floats, and at the time of the accident, he was on car float #659 doing certain work on freight cars

on the float which was then moored in and on the navigable waters of the United States.

(c) That while he was on the car float moored in and on the navigable waters of the United States, doing certain work on the freight cars thereon, he suffered an injury which is the basis of this law-suit.

(3) The plaintiff's attorney further concedes the following:

That the defendant has complied with all of the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, and that a certificate of compliance was issued to the Pennsylvania Railroad Company, defendant, by the United States Employees' Compensation Commission, which Commission has complete administration of the Longshoremen's and Harbor Workers' Compensation Act. That said certificate of compliance thus issued was in full force and effect at the time that the plaintiff herein was injured.

4. That the defendant made or offered to make payments to the plaintiff pursuant to and in compliance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

5. That the car float on which the accident occurred was known as car float #659 and was a vessel weighing more than eighteen tons.

6. That at the time of the accident the plaintiff was neither a master or member of a crew of the vessel.

7. That the plaintiff was not, at the time of the accident, an officer or an employee of the United States or any agency thereof.

[fol. 41] All of the foregoing are conceded by the attorney for the plaintiff on his behalf as being the conditions which prevailed on the date of the accident.

Accordingly, on the basis of the foregoing, I respectfully submit that the remedy of the plaintiff is exclusively under the provisions of the Longshoremen's and Harbor Workers' Compensation Act and with particular reference to

Section 905 of 33 U. S. C. A. That provision, in part, states as follows:

> "The liability of an employer prescribed in Section 904 shall be exclusive and in place of all other liability of such employer to the employee, * * * entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *."

Section 903 of the said Act provides, in part, as follows:

> "Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) * * *."

Section 904 provides that:

> "Every employer shall be liable for and shall secure the payment to his employees of the compensation * * *."

It follows, as a matter of law, that the defendant is entitled to judgment dismissing the complaint.

The authorities in support of the defendant's position are contained in the defendant's memorandum of law which is respectfully submitted herewith.

A. Harold Frost.

(Sworn to May 31, 1951.)

[fol. 42] In United States District Court

Affidavit of Herbert Zelenko Read in Opposition to Motion

State of New York,
County of New York, ss:

Herbert Zelenko, being duly sworn, deposes and says:

That I am the attorney of record for the plaintiff herein.

That suit has been instituted in plaintiff's behalf under the Federal Employers' Liability Act and the Safety Appliance Act to recover damages thereunder for personal

injuries suffered by the plaintiff through the negligence of the defendant;

That this affidavit and the appended memorandum of law are submitted in opposition to the defendant's motion for judgment dismissing the compliant pursuant to Rules of Federal Procedure 12b(6), 56b, and 56d;

That this is not a frivolous lawsuit but one which affiant believes is fully warranted under the facts and the law pertinent thereto;

That this motion on behalf of the defendant resolves the principal issue in the case to a serious question of law which because of amendments to the Federal Statutes and recent decisions of the Federal Courts, both lower and appellate, appears to be unsettled;

That, for the purpose of this motion, plaintiff concedes that the accident occurred on navigable waters; plaintiff further concedes the facts contained in Paragraphs 2(a) [fol. 43] (b)(c), 3, 4, 5, 6 and 7 of defendant's affidavit sworn to by A. Harold Frost, Esq.;

That, contrary to defendant's contention, your affiant believes that plaintiff's remedy is not under the Longshoremen's and Harbor Workers' Compensation Act since, as his deposition clearly shows, plaintiff did not perform services of a sort performed by longshoremen and harbor workers and was not engaged in maritime employment; plaintiff was a railroader, in every respect, whose duties were in whole in furtherance of interstate commerce, and, as a consequence, entitled to the substantial benefits of the Federal Employers' Liability Act and the Safety Appliance Acts;

That the fact, as appears in his deposition, that plaintiff from time to time was required to place himself, for short periods of time, aboard car floats moored alongside the shore in navigable waters, for the purpose of placing or removing freight cars thereon, and the additional fact that at the moment of his accident he was on a freight car which happened to be aboard a car float moored in navigable waters, are not sufficient to deprive plaintiff of the substantial rights secured to him as a railroader under the Federal Employers' Liability Act and the Safety Appliance Acts;

Wherefore, it is respectfully urged that the defendant's motion for judgment in its favor be in all respects denied and that the issue be allowed to proceed to trial as a cause of action under the Federal Employers' Liability Act and the Safety Appliance Act, or, that if the Court grants the defendant's motion herein that the Court enter an order granting plaintiff a certificate certifying his right to appeal therefrom, as if the same were a final order of this Court.

s/ Herbert Zelenko.

(Sworn to June 12, 1951.)

[fol. 44] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

OPINION

APPEARANCES:

Herbert Zelenko, attorney for plaintiff.

Conboy, Hewitt, O'Brien & Boardman, attorneys for defendant (A. Harold Frost, of counsel).

KENNEDY, J.

When this case appeared upon the trial calendar both counsel called my attention to the fact that the pleadings raised a serious question whether the Federal Employers' Liability Act (45 U. S. C. A. § 51) or the Safety Appliance Act (45 U. S. C. A. § 1 *et seq.*) (upon which statutes plaintiff's claim is based) could properly be invoked by plaintiff even if defendant's negligence were proved, or an unsafe appliance caused plaintiff's injuries. For plaintiff was injured while acting as a railroad freight brakeman on a car float moored in navigable waters. Both counsel assured me that there was no factual dispute at all concerning either the nature of plaintiff's employment when injured or the place of the occurrence of the accident. I told counsel that it seemed to me the rules of civil procedure were broad enough to permit a preliminary determination of this question. Counsel for defendant then moved to dismiss the complaint under Federal Rules of Civil Procedure 12b (6), 56b, and 56c supporting his motion with an affidavit. Counsel

for the plaintiff stipulated in his own affidavit that plaintiff's accident had occurred on navigable waters and specifically conceded the facts which I now outline.

[fol. 45] On January 28, 1948, plaintiff was employed by the defendant as a freight brakeman at the Harsimus Cove yards of the defendant at Jersey City, New Jersey. Part of plaintiff's duty was to work on car floats, and at the time of the accident he was doing brakeman's work on freight cars on Float #659 (owned by the defendant) while the vessel was moored in navigable waters of the United States. Plaintiff further conceded that defendant has made full compliance with all of the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. § 901 *et seq.*, as amended), that defendant has offered to make payments to the plaintiff pursuant to that act, and that none of the statutory exceptions in the act apply, because Float #659 was a vessel of a burden greater than 18 tons, and plaintiff was neither a master or member of the crew of the vessel, nor an officer or employee of the United States or any agency thereof at the time of the accident.

In the light of these conceded facts it seems to me that nothing but a question of law is presented, namely, whether a freight brakeman employed by a railroad and engaged in interstate commerce may invoke either the Federal Employers' Liability Act or the Safety Appliance Act, *supra*, even though he was injured upon a car float in navigable waters of the United States.

Both sides seem to admit that this question was decided in the negative by *Nogueira* v. *New York, New Haven & Hartford Railroad Company*, 1930, 281 U. S. 128. The plaintiff in that case was a freight handler engaged in handling a bale of paper which was, to use the language of the opinion, "a piece of interstate freight". Mr. Chief Justice Hughes, writing for an unanimous court, concluded that plaintiff's remedy under the Longshoremen's and Harbor Workers' Compensation Act was exclusive and that [fol. 46] he could not invoke the Federal Employers' Liability Act even though he was a railway employee.

But plaintiff, citing *Zientek* v. *Reading Co.*, D. C. E. D. Penn., 1950, 93 F. Supp. 875, urges that the *Nogueira* case

was legislated out of existence in 1939 when Congress added a paragraph to the key section of the Federal Employers' Liability Act (45 U. S. C. A. § 51). That addition (53 Stat. 1404) reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

The reasoning in the *Zientek* case is that the 1939 amendment, just quoted, changes the law laid down by the Supreme Court in *Nogueira*, and that Congress intended to put back under the protection of the Federal Employers' Liability Act all railway employees even though their injuries were sustained upon navigable waters. The gist of the decision is that the 1939 amendment was a Congressional enactment *later* than the Longshoremen's and Harbor Workers' Compensation Act and *later* than the *Nogueira* decision. And so, it is said that when Congress by its last word failed to protect the exemption set up by the Compensation Act and the *Nogueira* decision, it impliedly revoked it.

There are at least two decisions directly in conflict with *Zientek* (*Gussie* v. *Penn. R. R. Co.*, 1949, 1 N. J. Super. 293, 64 A. 2d 244, cert. den. 338 U. S. 869; *Job* v. *Erie R. Co.*, S. D. N. Y., 1948, 79 F. Supp. 697).

[fol. 47] In the case last mentioned, Judge Rifkind takes an entirely different view of the meaning of the 1939 amendment to the Federal Employers' Liability Act than was adopted in *Zientek*. Judge Rifkind says that when Congress made it clear by the amendment that an employee was to have the benefit of the Federal Employers' Liability Act, though only part of his duties was in furtherance of interstate commerce, the intent was to do away with the confusion resulting from the fact that railway employees are frequently shifted from interstate to intrastate commerce even within the space of one working day. Judge Rifkind says

that the object of the amendment was to do away with the "moment of injury" rule summarized in *New York, New Haven and Hartford Railroad Co.* v. *Bezue*, 1932, 284 U. S. 415. Certainly Judge Rifkind's position finds support in the printed report accompanying the 1939 amendment and the comments of the Senate Judiciary Committee (Senate Judiciary Report 661, quoted at length in *Southern Pac. Co.* v. *Industrial Accident Commission*, Supreme Court of California, 1942, 120 P. 2d. 880, 883).

Moreover it is difficult to see how the 1939 amendment would have changed the decision in the *Nogueira* case even had it been in existence when that decision was written. The amendment can be paraphrased as follows: if any part of an employee's duty furthers interstate commerce he is deemed to be an employee of the carrier and shall be considered such for the purpose of the benefits of the act. But Nogueira was undubitably engaged in interstate commerce as the opinion shows. The bale which he was handling was "a piece of interstate commerce". The opinion also shows that there was no contest over the question of employment. Hence, even though the 1939 amendment is in truth a later clarification of Congressional policy, it seems to me that the *Nogueira* decision would have come out exactly as it did even though the exact language of the amendment had been before the court.

[fol. 48] The brief for the plaintiff suggests that the *Nogueira* case is capable of being distinguished because the plaintiff there was a freight handler ("longshoreman"), whereas in the case at bar he is a brakeman ("railroader"). I think what plaintiff's counsel really hints at is that the traditional maritime tort-jurisdiction test (locality) has become outmoded, and that the nature of the employment should be a substitute or perhaps an alternative test. In fact, plaintiff cites *Davis* v. *Department of Labor and Industries of the State of Washington*, 1942, 317 U. S. 249, as pointing the way to a twilight zone in the decisions and a "case by case" technique (317 U. S. 249, 256). But there is nothing in the 1939 amendment to suggest that Congress was changing the locality test found in the Longshoremen's and Harbor Workers' Compensation Act. As for the *Davis* case, the Supreme Court there found itself dealing with

another complication arising from the "maritime but local" doctrine by which it had attempted to retreat from the harshness of the *Jensen* case prior to the enactment of the federal compensation act.[1] Mr. Justice Black cites many of these "maritime but local" decisions in a footnote in *Davis* (317 U. S. 249, 253). But although that footnote mentions *Nogueira*, as does the concurring opinion of Mr. Justice Frankfurter and the dissent of Mr. Chief Justice Stone, I find no suggestion in the *Nogueira* opinion that it was in any way affected by the "maritime but local" exception. Indeed one of the leading decisions (*Baizley Iron Works* v. *Span*, 1930, 281 U. S. 222), where the nature of employment ("local") test was vainly invoked to escape the *Jensen* decision, came down on the very same day as the *Nogueira* decision (April 14, 1930). Nowhere in *Nogueira* is the *Baizley* decision spoken of; nowhere in *Baizley* is *Nogueira* mentioned. Justice Holmes, Stone and Brandeis dissented in *Baizley*, but they concurred in *Nogueira*.

[fol. 49] I think the only true meaning that can be taken from *Nogueira* is that a tort committed against a "railroader" on a car float in navigable waters is maritime, and subject exclusively to the Longshoremen's and Harbor Workers' Compensation Act, regardless of the precise task in which he is engaged. If my interpretation of the *Nogueira* decision is correct, then it must be overruled in order to permit this plaintiff to recover under the Federal Employers' Liability Act or the Safety Appliance Act. I am not the one to overrule the decision, whether I like it or not.

The motion to dismiss the complaint is granted.

Harold M. Kennedy, United States District Judge.

[fol. 50] In United States District Court

Notice of Settlement—July 20, 1951

Sir:

Please take notice that an order of which the within is a true copy will be presented for settlement and entry herein

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[1] *Southern Pacific Co.* v. *Jensen*, 1916, 244 U. S. 205; see Robinson on Admiralty, pp. 101-109.

to Honorable Harold M. Kennedy, United States District Judge, at the United States Courthouse, 271 Washington Street, Borough of Brooklyn, City and State of New York, on the 2nd day of August, 1951, at 10:30 o'clock in the forenoon of that day.

Dated: New York, N. Y., July 20, 1951.

Yours, etc., Conboy, Hewitt, O'Brien & Boardman, By: Louis J. Carruthers, Member of Firm, Attorneys for Defendant, Office and Post Office Address, 39 Broadway, New York 6, N. Y.

To: Herbert Zelenko, Esq., Attorney for Plaintiff, Office and Post Office Address, One Park Place, New York 7, N. Y.

[fol. 51] IN UNITED STATES DISTRICT COURT

ORDER ON MOTION FOR JUDGMENT

The defendant having moved this Court for an order granting the defendant judgment dismissing the complaint herein pursuant to Rules 12b(6), 56b and 56d of the Federal Rules of Civil Procedure on the ground that there is no genuine issue as to any of the material facts with respect to the alleged legal liability of the defendant and that the defendant is entitled to judgment as a matter of law and that from the complaint, the plaintiff's sworn deposition, concessions and admissions, it is conclusively established that the plaintiff's exclusive remedy for personal injuries incurred while employed by the defendant is pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901 et seq., and the motion having regularly come on to be heard on the 13th day of June, 1951,

Now, on reading and filing the notice of motion, dated May 2, 1951, the affidavit of A. Harold Frost, sworn to the 31st day of May, 1951, in support of the motion, and the affidavit of Herbert Zelenko, sworn to the 12th day of June, 1951, in opposition to said motion, and upon all the pleadings and proceedings had herein and after hearing Conboy, Hewitt, O'Brien & Boardman, A. Harold Frost,

Esq., of counsel, for the motion, and Herbert Zelenko, Esq., in opposition thereto, and due deliberation having been had and on filing the decision of the Court, it is on motion of Conboy, Hewitt, O'Brien & Boardman, attorneys for the defendant,

[fol. 52] Ordered that said motion be and the same hereby is granted and that judgment be entered herein dismissing said complaint with $48.50 costs.

Enter, Harold M. Kennedy, U. S. D. J.

In United States District Court

Final Judgment Appealed From—August 9, 1951

A motion having been made by the defendant at a motion part of this Court held at the United States Courthouse, Eastern District of New York, 271 Washington Street, Brooklyn, New York on the 13th day of June, 1951 for an order granting the defendant judgment dismissing the complaint herein pursuant to Rules 12b(6), 56b and 56d of the Federal Rules of Civil Procedure on the ground that there is no genuine issue as to any of the material facts with respect to the alleged legal liability of the defendant and that the defendant is entitled to judgment as a matter of law and that from the complaint, the plaintiff's sworn deposition, concessions and admissions, it is conclusively established that the plaintiff's exclusive remedy for personal injuries incurred while employed by the defendant is pursuant to the provisions of the Longshoremen's and Harborworkers' Act, 33 U. S. C. A. 901, et seq., and said motion having been granted and an order having been duly made by U. S. District Judge Hon. Harold M. Kennedy on August 3, 1951 granting said motion and directing the [fol. 53] entry of judgment as hereinafter provided, it is on motion of Conboy, Hewitt, O'Brien & Boandman, attorneys for the defendant,

Adjudged that the complaint in this action be and the same hereby is dismissed and it is

Further adjudged that the defendant, The Pennsylvania Railroad Company, residing at Pennsylvania Station, New York City recover of the plaintiff, Charles E. O'Rourke,

residing at 2112 Dorchester Road, Brooklyn, New York the sum of $48.50 cost as taxed.

Dated, August 9, 1951.

Percy Gilkes, Clerk.

[fol. 54] In United States District Court

Notice of Appeal

Please take notice that the above-named plaintiff hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the Final Judgment entered and docketed in the Office of the Clerk of the United States District Court for the Eastern District of New York on the 9th day of August 1951, in which it was adjudged that the defendant have judgment against the plaintiff in the sum of $48.50 and the plaintiff appeals from each and every part of said final judgment as well as from the whole thereof.

Dated, New York, August 16th, 1951.

Herbert Zelenko, Attorney for Plaintiff-Appellant, Office & P. O. Address, One Park Place, Borough of Manhattan, City of New York.

To:

Clerk, United States District Court for the Eastern District of New York. Conboy, Hewitt, O'Brien & Boardman, Esqs., Attorneys for Defendant, 39 Broadway, New York 6, N. Y.

[fols. 55-56] Stipulation. (Omitted in printing)

Designation of Contents of Record on Appeal. (Omitted in printing)

[fol. 57] Stipulation as to Record. (Omitted in printing)

[fol. 58] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 59] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1951

No. 149

Argued January 18, 1952 Decided February 26, 1952

Docket No. 22213

CHARLES E. O'ROURKE, Plaintiff-Appellant,

v.

THE PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellee

Before: Augustus N. Hand and Clark, Circuit Judges, and Brennan, District Judge

Appeal from a judgment of the District Court for the Eastern District of New York, granting summary judgment dismissing plaintiff's complaint (99 F. Supp. 506).

Herbert Zelenko, Attorney for Plaintiff-Appellant; Richard C. Machcinski, of Counsel.

Conboy, Hewitt, O'Brien and Boardman, Attorneys for Defendant; A. Harold Frost, of Counsel.

[fol. 60] BRENNAN, District Judge:

Appeal from a judgment entered on an order of the district court granting a summary judgment dismissing plaintiff's complaint which sounds in negligence, and seeks to recover money damages on account of injuries received. The motion was made pursuant to Rules 12b (6), 56b and 56d of the Federal Rules of Civil Procedure, and is based upon the pleadings, affidavits of attorneys, the deposition of appellant, and certain concessions appearing in the record.

The complaint is based upon the Federal Employers' Liability Act (45 U. S. C. A. 51, etc.), hereinafter referred to as "Liability Act," and alleges violations of the Safety Appliance Act (45 U. S. C. A. 1, etc.). The lower court held that the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. 901, etc.), here-

inafter referred to as "Compensation Act," are applicable, and the appellant's remedy thereunder is exclusive.

The appellant was employed as a freight brakeman in the yards of the defendant at Jersey City, New Jersey. He was a regular member of a drill crew whose duties were to place freight cars so as to make up freight trains. The appellant from time to time released the brakes on or coupled the freight cars of his employer while they were located on car floats in navigable waters. He was injured while releasing a defective handbrake upon one of such cars preparatory to its removal.

The lower court relied upon the case of *Nogueira* v. *New York, New Haven and Hartford Railroad Co.*, 281 U. S. 128, and concluded that, although appellant was a "railroader," any tort committed against him upon a car float in navigable waters in maritime and subject exclusively to the Compensation Act, regardless of the precise task in which he was engaged at the time of the injury. The conclusion results from the application of the "locality test," authority [fol. 61] for which is claimed in the above decision and in the Compensation Act.

When the *Nogueira* case was before this court (32 F. 2nd 179), Judge Swan expressly reserved decision on the question which is now before us. We interpret the *Nogueira* decision in the Supreme Court as holding that Nogueira's employment was maritime in nature, and the injury occurring on navigable waters, the remedy afforded by the Compensation Act was exclusive. Nogueira was a railroad employee engaged when injured as a freight handler in loading a ship. There appeared to be no serious contention made but that his employment was traditionally maritime in nature. The main contention was that the car float was an adjunct to railroad transportation in interstate commerce. We find no language in the Supreme Court opinion which adversely affects the statement in the decision of the same case in this court: "Moreover, it does not follow that the mere locus of the accident necessarily determines the right" (at p. 182). We do not believe that the *Nogueira* decision controls here.

The designation of appellant as a brakeman bespeaks a specialized railroad employment quite apart from maritime service. The releasing of handbrakes, or the coupling of cars, is distinctively a railroader's job requiring par-

ticular training and accompanied with particular risks peculiar to the business of railroading alone. To hold that one so employed and engaged is in maritime service is to ignore reality. Such a conclusion can only be reached by making the locality of the accident the sole test of maritime employment and the determining factor in coverage afforded by the Compensation Act. We find no warrant either in the *Nogueira* decision or in law for such a test. The Compensation Act, in Sections 903 (a) and 902 (4), by indirection at least, provides that employment in maritime service and injury upon navigable waters are the bases of coverage. Such provisions, although they may be related, are sepa-
[fol. 62] rate, and the finding of the existance of an injury occurring upon navigable waters does not in itself require a finding of maritime employment.

No authoritative precedent is cited which requires the result below. It is true that the case of *Buren* v. *Southern Pacific Co.*, 50 F. 2nd 407, appears to be in accord with that decision. In that case the plaintiff was actually a passenger upon the boat during the period between the performance of his duty to tighten the brakes on the cars when they entered the boat and to loosen them as they were removed therefrom. The complaint in its allegation as to Buren's duties was much more broad than in the instant case insofar as it alleges his duties in connection with the loading and unloading of the freight cars upon or from the boat. Here we find no such allegation, and appellant's physical presence upon the boat appears to be only occasional and incidental. As in the *Nogueira* case, the main contention seems to have been that the boat upon which Buren was injured was a part of defendant's railroad system. If that decision is construed to hold that the injury occurring on navigable waters in itself requires exclusive application of the provisions of the Compensation Act, we respectfully differ with it.

The principle that torts occurring upon navigable waters determine admiralty jurisdiction is not in question here. Here we have a problem concerning the coverage afforded under one or two remedial statutes which must be determined by the provisions thereof, "* * * for the question still is to what cases does that act (Compensation Act),

apply according to its terms" (*Nogueira* v. *N. Y., N. H. and H. R. R. Co., supra* at 137).

The legislative history of both statutes has been explored in prior decisions to determine congressional intent. Their recitation here would be useless repetition. The general scheme of the Compensation Act was to provide compensa-[fol. 63] tion to employees engaged in maritime employment for disability or death resulting from injury occurring upon the navigable waters of the United States (*Nogueira* v. *N. Y., N. H., and H. R. R. Co., supra* 131). The purpose of the Liability Act was similarly to provide to railroad employees a remedy for injury or death while engaged in interstate commerce. Its coverage has been extended by the 1939 Amendment which abolished the so-called "moment of injury" rule. We do not believe that the 1939 Amendment to the Liability Act is vital here, although its application has resulted in conflicting decisions (*Job* v. *Erie*, 79 F. Supp. 698; *Zientek* v. *Reading Co.*, 93 F. Supp. 875). Certainly it has extended the protection given to railroad employees by broadening the requirement as to employment in interstate commerce. Moreover, the Liability Act specifically refers to negligence on the part of an employer due to defects in its "* * * boats (or) wharves * * *" The congressional intent as to its coverage would therefore seem to extend to railroad employees injured while engaged in railroad work on navigable waters, and the fact that the injury happened while the plaintiff was on such waters does not mean that his sole remedy is under the Compensation Act. Our problem, however, is not one of employment in interstate commerce, but of maritime employment, as the term is used in the Compensation Act. This decision rests upon the consideration of that question.

The language of the Compensation Act and the legislative scheme prompt the holding that appellant was a railroad employee injured while engaged in distinctive railroad work. He was not employed in maritime employment at the time of his injury within the meaning of the Compensation Act, and his rights are not limited thereby.

Reversed.

[fol. 64] CLARK, Circuit Judge (dissenting):

I would affirm on the persuasive opinion of Judge Kennedy below, D. C. E. D. N. Y., 99 F. Supp. 506, which, in my view, correctly evaluates the precedents and the legislative policy. The decision here rejects traditional tests to rely upon something found in the nature of the employer's job, a distinction so vagrant and fleeting that it apparently cannot be stated more precisely than something "distinctively a railroader's job," or a "specialized railroad employment," requiring particular training and with particular risks. But how that can be given anything like finite application to distinguish between a "freight handler" manipulating freight, and a "railroader" manipulating brakes, on a car-float, I am unable to perceive. Moreover, as is conceded, the very case of the freight handler was that of a "railroader" nonetheless granted compensation. *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128. Note, too, the opinion of Chief Justice Hughes, 281 U. S. at page 134: "A car float in navigable waters is subject to the maritime law like any other vessel. * * * No exception is made of the employees of a railroad company employed in maritime service on the navigable waters of the United States or with respect to the question whether such employment was in connection with an extension of railroad transportation."

To me the *Nogueira* case seems wholly controlling in both its reasoning and its holding. And there is a very strong current of judicial opinion elsewhere to that effect. An exact precedent is found in *Buren* v. *Southern Pac. Co.*, 9 Cir., 50 F. 2d 407, where the Supreme Court denied certiorari, 284 U. S. 638. Other cases of "railroaders"—brakemen—on car floats include *Richardson* v. *Central R. Co. of New Jersey*, 233 App. Div. 603, 253 N. Y. S. 789; *Gassie* [fol. 65] v. *Pennsylvania R. Co.*, 1 N. J. Super. 293, 64 A. 2d 244, certiorari denied 338 U. S. 869; and *Job* v. *Erie R. Co.*, D. C. S. D. N. Y., 79 F. Supp. 698. And there are analogous cases such as *Parker* v. *Motor Boat Sales*, 314 U. S. 244, involving a janitor actually testing a motor boat in operation at the time of injury; or *Travelers Ins. Co.* v. *McManigal*, 5 Cir., 139 F. 2d 949, *Travelers Ins. Co.* v. *Branham*, 5 Cir.,

136 F. 2d 873, and *Mamat* v. *United Fruit Co.*, D. C. S. D. N. Y., 39 F. Supp. 103, involving by employment purpose a carpenter, a concrete pourer, and a member of a shore gang respectively, but brought under the Compensation Act by their activities when injured. The only case distinctly to the contrary appears to be *Zientek* v. *Reading Co.*, D. C. E. D. Pa., 93 F. Supp. 875, which rests upon a reading of the 1939 amendment to the F. E. L. A. disavowed here.

Here the employer was engaged in a maritime activity in which it was the employee's regular duty to assist. That the employee at other times performed shore railroad duties was of no moment. It was his "actual duties" at the time which controlled. *Long Island R. Co.* v. *Lowe*, 2 Cir., 145 F. 2d 516, 518; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 260. As the Court said in *Parker* v. *Motor Boat Sales, supra*, 314 U. S. at pages 246, 247, with reference to the claim that the Act did not apply because of the local character of the employment: "This proposition cannot be rested on the ground that Armistead, hired primarily as a janitor and porter, was predominantly a non-maritime employee. For, habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity that the award was here made."

[fol. 66] These cases seem to me to show as clear a line of demarcation as we can reasonably expect in the difficult realms of jurisdiction so important and apparently so necessary to our federated organization of government. But now we give these up for what seems to me a chartless morass.

[fol. 67] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26th day of February, one thousand nine hundred and fifty-two.

Present: Hon. Augustus N. Hand, Hon. Charles E. Clark, Circuit Judges; Hon. Stephen W. Brennan, District Judge

CHARLES E. O'ROURKE, Plaintiff-Appellant,

-v.-

THE PENNSYLVANIA R. R. COMPANY, Defendant-Appellee

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell.

[fol. 68] [Endorsed:] United States Court of Appeals for the Second Circuit. Charles E. O'Rourke v. The Pennsylvania R. R. Co., 149. Judgment. United States Court of Appeals, Second Circuit. Filed February 26, 1952. Alexander M. Bell, Clerk.

[fol. 69] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 66] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 60

THE PENNSYLVANIA RAILROAD COMPANY, Petitioner,

vs.

CHARLES E. O'ROURKE

ORDER ALLOWING CERTIORARI—Filed October 13, 1952

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~763~~ 60

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

against

CHARLES E. O'ROURKE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

JOHN VANCE HEWITT,
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New York 6, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. .....

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

against

CHARLES E. O'ROURKE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, The Pennsylvania Railroad Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this cause on February 26, 1952 (R. 64-65).

Opinions Below

The opinion and the dissenting opinion of the United States Court of Appeals for the Second Circuit reversing the judgment of the United States District Court for the

Eastern District of New York are reported in 194 F. 2d 612, 613, 615, and appear in the record at pages 59-62 and 63-64. The opinion of the United States District Court dismissing the complaint is reported in 99 F. Supp. 506, and appears in the record on pages 44-49.

Jurisdiction

The judgment of the United States Court of Appeals was entered on February 26, 1952 (R. 64-65). Jurisdiction is conferred upon this Court to review this case by writ of certiorari under Title 28 United States Code, Section 1254.

Questions Presented

The principal questions raised by the holding of the Court of Appeals are as follows:

1. Whether the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. §§ 901 *et seq.*, was applicable and afforded an exclusive remedy for respondent's injury; or

2. Whether the Federal Employers' Liability Act, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U. S. C. §§ 51 *et seq.*, or the Safety Appliance Act, 27 Stat. 531, 45 U. S. C. §§ 1 *et seq.*, could properly be invoked for respondent's injury.

Respondent was injured on a car float of more than eighteen tons, owned and operated by the petitioning railroad company. The float was a vessel used in the transportation of railroad cars across the river to a pier at Harsimus Cove at Jersey City, New Jersey, and at the time of the injury was lying there in navigable waters (R. 39-40, 42-43). Respondent, while "engaged in defendant's

business of interstate commerce" (R. 4), was performing his regularly assigned duties as a member of a drill crew (R. 14) unloading freight cars from a car float and making them up into trains (R. 13). While on one of the freight cars releasing the hand brakes for its removal from the car float, he was knocked or fell from the car, striking the platform of the car float and thereby sustaining an injury, as is more fully set forth in the Statement below.

Statutes Involved

The statutes here involved are the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424; as amended, 33 U. S. C. §§ 901 *et seq.*, hereinafter sometimes referred to as the "Compensation Act"; Federal Employers' Liability Act, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U. S. C. §§ 51 *et seq.*, and Safety Appliance Act, 27 Stat. 531, 45 U. S. C. §§ 1 *et seq.*; and the pertinent provisions thereof are set forth in the Appendix (*infra*, p. 19).

Statement

When this case appeared on the trial calendar of the United States District Court for the Eastern District of New York, both counsel called the attention of the judge, Hon. Harold M. Kennedy, to the fact that the pleadings raised a serious question whether the Federal Employers' Liability Act or the Safety Appliance Act (upon which statutes respondent's claim was based) could properly be invoked by respondent, even if petitioner's negligence were proved, or an unsafe appliance caused respondent's injuries (R. 44), or whether his remedy was exclusively under the Longshoremen's and Harbor Workers' Compensation Act as alleged in the answer (R. 7, 8). Hav-

ing ascertained that there was no factual dispute concerning the nature of respondent's employment when injured or the place of the occurrence of the accident, the learned judge suggested a preliminary determination of the proper remedy (R. 44). Thereupon counsel for petitioner moved to dismiss the complaint under the Federal Rules of Civil Procedure, Rules 12(b)(6), 56(b) and 56(d), supporting his motion with an affidavit (R. 37, 39, 44). In an affidavit in opposition, counsel for respondent made specific admissions and concessions essential to such determination (R. 42-43).

The conceded facts are as follows: Respondent was employed by petitioner, The Pennsylvania Railroad Company, at its Harsimus Cove Yards, Jersey City, New Jersey (R. 39). As a part of his duties, he was required to assist in the placing of freight cars on, or removing them from, car floats owned and operated by petitioner (R. 40, 43), and in which they had been, or were to be, transported by petitioner across the Hudson River, to or from Harsimus Cove (R. 13), where the car floats were moored in and upon navigable waters of the United States (R. 40, 42-43). Respondent was a regular member of the drill crew (R. 14) which was so engaged in the placing on or removal of the freight cars from the car floats (R. 43) and in making them up into trains (R. 14), and also in making up other trains from cars on shore. His drill crew generally consisted of himself and an engineer, a fireman, a conductor and another brakeman. In the general course of their business, they would go down to the water with an engine and pusher, something like a flat car, and the pusher would be backed by the engine on to the car float and coupled up with the lead freight car (R. 15), sometimes by the other brakeman and sometimes by himself (R. 13); the hand brakes would be released and the freight cars, which were coupled together, drawn from the car floats (R. 21-27). Respondent's particular

job in this respect was generally to release the hand brakes on the freight cars. Sometimes he would "pull the pin or couple up." It would depend upon what he "wanted to work on" (R. 13).

On the occasion of the accident this customary procedure was followed. After having taken off cars from three or four other floats (R. 14), the pusher was backed by the engine on to a car float with two tracks and coupled up with the lead freight car on the north side. Respondent climbed from the pusher on to the platform of the car float and thence on to the freight box cars to release the hand brakes. After having thus released the hand brakes on several box cars, he came to the car in question on the south side, succeeded in releasing the hand brake by which, as he claims, he was thrown off balance and fell from the box car on to and striking the platform of the float, suffering the injury which is the basis of this law suit (R. 21-27, 40).

Since the accident and after some hospitalization, respondent has been working as a freight brakeman at Pennsylvania Station, New York, with the same rate of pay (R. 29-30).

Respondent alleges in the complaint that at the time of the accident he "was engaged in the defendant's business of interstate commerce" (R. 4). In addition to the above concessions, respondent stipulated that the accident occurred on navigable waters of the United States (R. 42-43); that petitioner had complied with all of the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended; that the car float on which the accident occurred was a vessel weighing more than eighteen tons; that he was not a master or member of the ship's crew within the meaning of the Compensation Act and did not fall within its other exceptions; and finally that petitioner made or offered to make payments to him pursuant

to and in compliance with the provisions of the said Act (R. 39-40, 42-43).*

Upon the admissions and concessions by and on behalf of respondent (R. 44-45), Judge Kennedy granted the motion to dismiss the complaint with an opinion (R. 44-49) that respondent's exclusive remedy was under the said Compensation Act, and judgment was entered thereon (R. 52). As heretofore stated, the United States Court of Appeals for the Second Circuit reversed, with an opinion by District Judge Brennan (R. 59 *et seq.*) and by Circuit Judge Clark dissenting (R. 63 *et seq.*).

Specification of Errors to be Urged

The Court of Appeals for the Second Circuit erred:

(1) In reversing the order and judgment of the District Court, which dismissed the complaint on the ground that the Longshoremen's and Harbor Workers' Compensation Act was applicable and afforded respondent an exclusive remedy.

(2) In holding that the Longshoremen's and Harbor Workers' Compensation Act was not applicable.

(3) In holding that the Longshoremen's and Harbor Workers' Compensation Act did not afford respondent an exclusive remedy for his injury.

(4) In holding that the Federal Employers' Liability Act and the Safety Appliance Act were applicable and afforded a remedy for respondent's injury.

---

* The limitation of time for filing claims under the Compensation Act does not begin to run until the determination of this suit. Section 13(d), 44 Stat. 1432, 33 U.S.C. § 913(d).

Reasons for Granting the Writ

I.

The Court of Appeals has decided important questions of Federal law which have not been, according to the majority opinion, but should be, settled by this Court.

It is of the utmost importance that the employer and employee should know what remedy is available for such an injury sustained by a railroad employee who, as a part of his regular duty, was assisting in the unloading of a car float. It is particularly important to the employee lest, while pursuing the wrong, he may lose the benefit of the right remedy. This was recognized by the attorney for the respondent who cooperated with counsel for petitioner and the court in presenting the question for early determination (R. 42-43). The desirability has also been recognized by this Court. *Davis* v. *Department of Labor*, 317 U. S. 249, 254-255.

It is respectfully submitted that the questions should be determined by this Court at this time. *United States* v. *General Motors Corp.*, 323 U. S. 373, 377; *Land* v. *Dollar*, 330 U. S. 731, 734, n. 2; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 685, n. 3. Whatever the result of a trial on the merits may be, the question of the proper remedy must be decided. If, upon the trial, respondent should be unable to prove fault on the part of the employer or a defect in the appliance, he will desire relief under the Compensation Act, providing for compensation without fault, which must be denied him unless the decision of the Court of Appeals is reversed. If, on the other hand, respondent should obtain a judgment under the Federal Employers' Liability Act, it would be rendered ineffective if petitioner's position should then be sustained.

Circuit Judge Clark (R. 63-64) and District Judge Kennedy (R. 47-49) thought it had been settled that a railroad employee injured while engaged on a vessel in navigable waters, as in this case, as a part of his required duties in loading upon or unloading from the vessel freight cars moving in interstate commerce, was entitled to the exclusive benefits of the Compensation Act. It is unimportant whether such duties were on full time or on part time. A car float in navigable waters is subject to the maritime law like any other vessel. See *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, 134. A railroad transporting its freight cars across navigable waters is engaged in maritime activity. Its employee assisting in unloading a car float is employed in maritime service.

It was generally thought that a definite guide had been established for railroad employers and employees, see *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128; *Buren* v. *Southern Pacific Co.*, 50 F. 2d 407 (9th Cir.), *cert. denied* 284 U. S. 638; *Richardson* v. *Central R. Co. of N. J.*, 233 App. Div. 603, 253 N. Y. S. 789; *Gussie* v. *Pennsylvania R. Co.*, 1 N. J. Super. 293, 64 A. 2d 244, *cert. denied* 338 U. S. 869; *Job* v. *Erie R. Co.*, 79 F. Supp. 698 (S. D. N. Y.); with one case to the contrary, *Zientek* v. *Reading Co.*, 93 F. Supp. 875 (E. D. Pa.), and that resting upon a reason disavowed by the majority opinion here (R. 62, 64).

But now, notwithstanding the large number of railroad employees in all parts of the country who have, for full or part time, assigned to them duties of placing on and removing freight cars from ferries and car floats, the employers and employees are left with no standard to guide them. If the railroad employee is loading or unloading freight from a freight car on the car float, the Compensation Act is applicable and is his exclusive remedy, *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128; but if he is assisting in unloading a car float by releasing the hand brakes to remove the freight cars, he is not entitled to such

protection, according to the majority opinion (R. 59 *et seq.*), if his maritime duties are on part time (but see 44 Stat. 1425, 33 U. S. C. § 902(4)). As Circuit Judge Clark states (R. 63):

> "The decision here rejects traditional tests to rely upon something found in the nature of the employer's job, a distinction so vagrant and fleeting that it apparently cannot be stated more precisely than something 'distinctively a railroader's job.' or a 'specialized railroad employment,' requiring particular training and with particular risks. But how that can be given anything like finite application to distinguish between a 'freight handler' manipulating freight, and a 'railroader' manipulating brakes, on a car float, I am unable to perceive."

And referring to the above cases, *supra*, p. 8, he further states (R. 64):

> "These cases seem to me to show as clear a line of demarcation as we can reasonably expect in the difficult realms of jurisdiction so important and apparently so necessary to our federated organization of government. But now we give these up for what seems to me a chartless morass."

The employee is entitled to know with reasonable certainty what remedy to pursue. The railroads of the country should know whether they are compelled to provide for compensation without fault in such cases or only for negligence or failure to provide safety appliances.

It is important that these questions be settled by this Court.

II.

There is now a sharp conflict in judicial opinion, whether, on the facts of this case, the employee's remedy is under the Longshoremen's and Harbor Workers' Compensation Act or the Federal Employers' Liability Act and the Safety Appliance Act, which ought to be resolved by this Court.

The decision of the United States Court of Appeals for the Second Circuit, with Clark, J. dissenting, is in direct conflict with the decision of the Circut Court of Appeals for the Ninth Circuit in *Buren* v. *Southern Pacific Co.*, 50 F. 2d 407 (9th Cir.), *cert. denied* 284 U. S. 638, in which it was held that the Compensation Act provided an exclusive remedy for a railroad brakeman injured in releasing the brakes of a freight car on a car ferry in navigable waters of the United States. As stated by Circuit Judge Clark in approving the opinion of the District Court "An exact precedent is found in *Buren* v. *Southern Pac. Co.*, 9 Cir., 50 F. 2d 407, where the Supreme Court denied certiorari . . . ."

Other decisions, involving railroad employees injured on navigable waters, in sharp conflict with the decision of the Court of Appeals in the instant case are: *Richardson* v. *Central R. Co. of N. J.*, 233 App. Div. 603, 253 N. Y. S. 789; *Gussie* v. *Pennsylvania R. Co.*, 1 N. J. Super. 293, 64 A. 2d 244, *cert. denied* 338 U. S. 869; and *Job* v. *Erie R. Co.*, 79 F. Supp. 698 (S. D. N. Y.).

It is important that this diversity of opinion be resolved by this Court.

III.

The Court of Appeals has decided Federal questions in a way probably in conflict with applicable decisions of this Court.

Circuit Judge Clark in his dissenting opinion, speaking of the decision of this Court in *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, says: "To me the *Nogueira* case seems wholly controlling in both its reasoning and its holding" (R. 63). In the *Nogueira* case, likewise brought in the District Court under the Federal Employers' Liability Act, the judgment dismissing the complaint upon the ground that the Longshoremen's and Harbor Workers' Compensation Act was applicable and afforded an exclusive remedy, was affirmed by the Circuit Court of Appeals and by this Court. In that case, the employee was injured when thrown to the floor of a car float belonging to the defendant railroad company. The float was used in transporting cars and at the time of the injury was lying in navigable waters at a pier in New York Harbor. The injured employee was one of a gang of freight handlers loading freight into a railroad car. His duties were not, as assumed in the opinion of Judge Brennan (R. 614), of the nature of the traditionally maritime longshoreman or stevedore. He was not stowing cargo in the hold of a vessel and thus involving "the safety of the ship itself" as in *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 62. His duties were maritime, not because loading freight into a railroad car is inherently maritime, but because loading it into a car on a car float is an essential part of the transportation by water. There is obviously no distinction between loading freight into a railroad car on a float and placing a freight car on the float, in so far as participation in commerce by water is concerned. Each is

a service necessary to enable the car float to perform its maritime function. Clearly there is no distinction between loading and unloading in that respect.

In rendering the decision of this Court in the *Nogueira* case, the Chief Justice said (pp. 133-4):

> "The distinction was thus maintained between injuries on land and those which were suffered by persons engaged in maritime employment on a vessel in navigable waters.
>
> "From the standpoint of maritime employment, it obviously makes no difference whether the freight is placed in the hold or on the deck of a vessel, or whether the vessel is a car float or a steamship. A car float in navigable waters is subject to the maritime law like any other vessel."

The Chief Justice further said (p. 134):

> "No exception is made of the employees of a railroad company employed in maritime service on the navigable waters of the United States or with respect to the question whether such employment was in connection with an extension of railroad transportation."

Conclusion

In reversing the decision of the court below, the Court of Appeals decided an important question of Federal law which has not been, according to the majority opinion, but should be, resolved by this Court. Furthermore, the decision of the Court of Appeals has resulted in a sharp divergence of judicial opinion with respect to the application of the Longshoremen's and Harbor Workers' Compensation Act. As to the applicable principles, the Court of Appeals for the Second Circuit differed with the Court

of Appeals for the Ninth Circuit in *Buren* v. *Southern Pacific Co.*, 50 F. 2d 407 (9th Cir.), *cert. denied* 284 U. S. 638. The decision of the Court of Appeals is probably in conflict with the decision of this Court in *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128. For the reasons heretofore stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN VANCE HEWITT,
Attorney for Petitioner.

New York, N. Y., May 10, 1952.

IN THE

Supreme Court of the United States

October Term, 1951

No. .....

THE PENNSYLVANIA RAILROAD COMPANY,

Petitioner,

against

CHARLES E. O'ROURKE,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The opinions below, the statement as to jurisdiction, the statement of the case, and the specification of errors to be urged are set forth in the petition at pages 1, 2, 3, and 6, respectively, and are not repeated here.

ARGUMENT

The conflict in decisions, with respect to the large number of railroad employees throughout the country engaged in placing on and removing freight cars from car floats and car ferries lying in navigable waters, should be resolved by this Court and the status of such employees determined.

Respondent's case falls within the ambit of the decision in *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128. In that case, plaintiff was not a stevedore skilled in the art

of stowing cargo in the hold of a ship. He was not a longshoreman loading cargo into a ship. He was a railroad employee loading freight into a railroad car on a car float. He was a railroad freight handler assisting in the movement of goods by water in interstate commerce.

In the performance of his assigned duties, respondent was also engaged in interstate transportation and commerce. He too was on a vessel in navigable waters. He set the brakes in stopping the movement of the freight cars and released the brakes in starting them. He was engaged in the performance of the latter act at the moment of injury. He was assisting in unloading the cars from the float. He was performing acts in transportation by water. These required duties were exclusively of a maritime nature. His last training and position had been that of a stevedore (R. 11).

Until the decision of the Court of Appeals, it was generally thought to be settled that railroad employees engaged in loading into or removing cargo from vessels or placing on or removing freight cars from car floats or car ferries, lying in navigable waters, were covered by the Compensation Act. *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128; *Buren* v. *Southern Pacific Co.*, 50 F. 2d 407 (9th Cir.), *cert. denied* 284 U. S. 638; *Gussie* v. *Pennsylvania R. Co.*, 1 N. J. Super. 293, 64 A. 2d 244, *cert. denied* 338 U. S. 869; *Richardson* v. *Central R. Co. of N. J.*, 233 App. Div. 603, 253 N. Y. S. 789; *Job* v. *Erie R. Co.*, 79 F. Supp. 698 (S. D. N. Y.).

Until the decision herein sought to be reviewed, there was believed to be certainty in the remedy of railroad employees so engaged and in the liability of the employers. Such employees were to receive compensation regardless of fault. They were not to fall in the doubtful zone of employees not engaged in interstate transportation or commerce and whose occasional activities create borderline problems to be determined case by case. *Davis* v. *Depart-*

ment of Labor, 317 U. S. 249; *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469.

Now uncertainty has been substituted for certainty; indefiniteness for definiteness; insecurity for security (R. 63-64). Moreover, the decision involves a large class of employees throughout the country having similar or substantially identical duties, furnishing an unusual opportunity to provide a workable standard for employers and employees. They should be informed whether there is to be compensation irrespective of fault or recompense only upon proof of negligence or unsafe equipment.

The objection that their activities are part time only was answered in *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 247, in which this court overruled such an objection stating:

> "Moreover, § 2(4) of the Act expressly provides for its application to 'employees [who] are employed . . . in whole or *in part* upon the navigable waters of the United States.'"

The Court of Appeals found in that case that the janitor or porter, whose work was predominantly non-maritime, was not shown to have been theretofore sent by the company on to a boat on the navigable river (116 F. 2d 789, 791). Nevertheless the single occasion provided the essential "maritime activity."

The petitioning railroad company, operating car floats in navigable waters in transportation between the states, is clearly an employer within the meaning of Section 2(4) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. §§ 901 *et seq.*, see Appendix, *infra*, p. 19. The employee does not fall within the exceptions of subdivision (3) of said section since he was not a master, nor a member of the ship's crew, nor unloading a vessel under eighteen tons

(R. 39-40, 42-43). He was performing the service of transportation on water. He was accordingly covered by Section 3 (33 U. S. C. § 903) and the remedy was made exclusive by Section 5 (33 U. S. C. § 905). No exception is made of the employees of a railroad company in maritime service on navigable waters or with respect to the question whether such employment was in connection with an extension of railroad service. *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128.

As reported to and first passed by the Senate, the bill contained a provision in Section 3 excepting "an employee of a common carrier by railroad engaged in interstate or foreign commerce . . . if the injury from which the disability or death results occurred while the employee was employed in such commerce." Senate Report No. 973, 69th Congress, First Session; see also *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, 136. This exception was eliminated from the bill as finally passed. Until Congress writes that exception into the Act, respondent and other such employees are within its exclusive coverage. Section 5 (33 U. S. C. § 905). It was suggested that the said exception, eliminated by Congress, was in effect re-enacted by the 1939 amendment to the Federal Employers' Liability Act (53 Stat. 1404, 45 U. S. C. §§ 51 *et seq.*) (*Zientek* v. *Reading Co.*, 93 F. Supp. 875; (E. D. Pa.)), but that argument was abandoned in the Court of Appeals and disavowed by that court (R. 62, 64). See also *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 189-190; *Job* v. *Erie R. Co.*, 79 F. Supp. 698 (S. D. N. Y.).

Since the decisions in different circuits have been brought into conflict, the status of the employees unsettled, and the Court of Appeals has probably failed to follow the controlling decision of this Court, the petition should be granted.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN VANCE HEWITT,
Attorney for Petitioner.

New York, N. Y., May 10, 1952.

Appendix

The relevant provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. §§ 901 *et seq.*, are the following:

"§ 902. *Definitions.* When used in this chapter—

. . . . .

(3) The term 'employee' does not include a master or a member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.) . . . ."

"§ 903. *Coverage.* (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; . . . ."

"§ 904. *Liability for compensation.* (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this chapter. In the case

of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury."

"§ 905. *Exclusiveness of liability.* The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 60.

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

against

CHARLES E. O'ROURKE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinions Below

The opinion and the dissenting opinion of the United States Court of Appeals for the Second Circuit reversing the judgment of the United States District Court for the Eastern District of New York are reported in 194 F. 2d 612, 613, 615, and appear in the record at pages 48-51 and 52-53. The opinion of the United States District Court dismissing the complaint is reported in 99 F. Supp. 506, and appears in the record on pages 40-44.

Jurisdiction

The judgment of the United States Court of Appeals was entered on February 26, 1952 (R. 53-54). The petition for a writ of certiorari was filed on May 12, 1952, and was granted on October 13, 1952 (R. 55). Jurisdiction is conferred upon this Court to review this case by writ of certiorari under Title 28, United States Code, Section 1254.

Questions Presented

The principal questions raised by the holding of the Court of Appeals are as follows:

1. Whether the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C., §§ 901 *et seq.*, was applicable and afforded an exclusive remedy for respondent's injury; or

2. Whether the Federal Employers' Liability Act, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U. S. C., §§ 51 *et seq.*, or the Safety Appliance Act, 27 Stat. 531, 45 U. S. C., §§ 1 *et seq.*, could properly be invoked therefor.

Respondent was injured on a car float of the petitioning railroad company. The float was a vessel of more than 18 tons, used in the transportation of railroad cars across the river to and from Harsimus Cove, Jersey City, New Jersey, and at the time of the injury was lying there in navigable water (R. 36-37, 38, 39). Respondent, while "engaged in the defendant's business of interstate commerce" (R. 4), was performing a part of his assigned duties as a regular member of a drill crew unloading freight cars from a car float (R. 10, 11). While on one of the freight cars releasing the hand brakes for its removal from the car float, he was knocked or fell from the car, striking the platform of the car float and thereby sustaining an injury, as is more fully set forth in the Statement below.

Statutes Involved

The statutes here involved are the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C., §§ 901 *et seq.*, hereinafter sometimes referred to as the "Harbor Workers' Compensation Act" or as the "Act"; Federal Employers' Liability Act, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U. S. C., §§ 51 *et seq.*, and Safety Appliance Act, 27 Stat. 531, 45 U. S. C., §§ 1 *et seq.* The pertinent provisions thereof are set forth in the Appendix (*infra*, p. 17).

Statement

When this case appeared on the trial calendar of the United States District Court for the Eastern District of New York, counsel for both plaintiff and defendant called the attention of the judge, Hon. Harold M. Kennedy, to the fact that the pleadings raised a serious question whether the respondent could invoke the Federal Employers' Liability Act and the Safety Appliance Act (upon which statutes his complaint was based) (R. 40), or whether his remedy was exclusively under the Longshoremen's and Harbor Workers' Compensation Act, as alleged in the answer (R. 5, 6). Having ascertained that there was no factual dispute concerning the nature of respondent's employment when injured or the place of the occurrence of the accident, the learned judge suggested a preliminary determination of the proper remedy (R. 40). Thereupon counsel for petitioner moved to dismiss the complaint under the Federal Rules of Civil Procedure, Rules 12(b)(6), 56(b) and 56(d), upon the pleadings, a part of the deposition of plaintiff and concessions in the affidavits (R. 3, 5, 8 ff, 35, 36, 37, 38, 39).

The conceded facts are as follows: Having theretofore been doing stevedoring work (R. 8), respondent was em-

ployed by petitioner, The Pennsylvania Railroad Company, at its Harsimus Cove Yards, Jersey City, New Jersey (R. 9, 36, 38, 39). As a part of his duties, he was required to work on car floats and to assist in placing freight cars on, or removing them from, car floats owned by petitioner and in which they had been, or were to be, transported in interstate commerce across the Hudson River to or from Harsimus Cove (R. 3, 4, 10, 36, 37, 38, 39, 40, 41) where the car floats were moored in and upon navigable waters of the United States (R. 36-37, 38, 39). Respondent was a regular member of one of the drill crews which were so engaged in the placing on, or removal of the freight cars from, the car floats (R. 10, 11, 38, 39). His drill crew generally consisted of himself and an engineer, a fireman, a conductor and another brakeman. In the general course of their duties in removing freight cars from the car floats, they would go down to the water with an engine and pusher, something like a flat car, and the pusher would be backed by the engine onto the car float and coupled up with the head freight car (R. 12), sometimes by the other brakeman and sometimes by himself (R. 10); the hand brakes would be released and the freight cars, coupled together, drawn from the car floats (R. 9-12). Respondent's particular job in this respect was generally to release the hand brakes on the freight cars. Obviously the procedure would be reversed and he would tighten the brakes when placing freight cars on the car float.

On the occasion of the accident the customary procedure was followed. After taking off cars from three or four other floats (R. 12), the pusher was backed by the engine onto a car float with two tracks, and coupled up by respondent with the head freight car on the north side (R. 13). Respondent climbed from the pusher onto the platform of the car float and then onto one of the box cars to release the hand brakes. Having done so on several box cars, he states that he came to the car in question

on the south side, attempted to release the hand brake, was thrown off balance, fell from the box car onto and striking the platform of the float suffering an injury which was the basis of this action (R. 18-24, 36, 37, 38, 39).

Since the accident and after some hospitalization, respondent has been working as a brakeman at Pennsylvania Station, New York, with the same rate of pay (R. 28). Respondent alleges in the complaint that at the time of the accident he "was engaged in the defendant's business of interstate commerce" (R. 4).

In addition to the above concessions, respondent stipulated that the accident occurred on navigable waters of the United States (R. 36-37; 38, 39); that petitioner had complied with all of the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended; that the car float on which the accident occurred was a vessel weighing more than 18 tons; that respondent was neither a master or member of the crew of the vessel, nor an officer or employee of the United States or any agency thereof at the time of the accident and was not and did not fall within the other statutory exceptions; and finally, that petitioner made or offered to make payments to him pursuant to and in compliance with the provisions of the said act (R. 36, 37, 38, 39, 40, 41).[1]

Upon the admissions and concessions by and on behalf of the respondent (R. 40-41), Judge Kennedy granted the motion to dismiss the complaint with an opinion that respondent's exclusive remedy was under the said Harbor Workers' Compensation Act (R. 40-44), and judgment was entered thereon (R. 46-47). As heretofore stated, the United States Court of Appeals for the Second Circuit

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[1] The limitation of time for filing claims under the Harbor Workers' Compensation Act does not begin to run until the determination of this suit (§ 13(d), 33 U. S. C. § 913(d)).

reversed with an opinion by District Judge Brennan (R. 48 *et seq.*) and by Circuit Judge Clark, dissenting (R. 52 *et seq.*).

Specification of Errors to Be Urged

The Court of Appeals for the Second Circuit erred:

(1) In holding that the Longshoremen's and Harbor Workers' Compensation Act did not afford respondent an exclusive remedy for his injury.

(2) In holding that the Longshoremen's and Harbor Workers' Compensation Act was not applicable.

(3) In holding that the Federal Employers' Liability Act and the Safety Appliance Act were applicable and afforded a remedy for respondent's injury.

(4) In reversing the order and judgment of the District Court, which dismissed the complaint on the ground that the Longshoremen's and Harbor Workers' Compensation Act was applicable and afforded respondent an exclusive remedy.

ARGUMENT

The Longshoremen's and Harbor Workers' Compensation Act is applicable and affords respondent an exclusive remedy.

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. §§ 901 *et seq.*, provides a compulsory system of compensation, irrespective of the employer's fault, for disability or death resulting from injury to employees occurring upon the navigable waters of the United States, if the employer has employees engaged in maritime employment, in whole or in part, upon

the navigable waters of the United States, and if recovery may not validly be provided by state compensation laws, with certain exceptions not herein important (§§ 2, 3, 33 U. S. C. §§ 902, 903). See *supra*, page 5. The appellant railroad company, operating car floats in navigable waters, is an employer within the meaning of Section 2, subdivision (4) of the said Harbor Workers' Compensation Act (see *infra*, p. 10), and has complied with the provisions of said Act (R. 36, 37, 38, 39).

As hereinbefore stated, the District Court granted a motion to dismiss the complaint on the ground that the Harbor Workers' Compensation Act provided an exclusive remedy (R. 40, 45). The Court of Appeals reversed, holding that respondent was not employed in "maritime employment" (R. 48), Judge Clark dissenting.

The respondent was injured on a vessel, lying in navigable waters (R. 36-37, 38, 39). He was engaged in the performance of a maritime service, for loading and unloading a ship's cargo is of that character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; it is a service absolutely necessary to enable the vessel to discharge its maritime duty. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52. The danger from a heavily loaded freight car inadequately secured and moving back and forth on a car float is readily apparent. With the brake improperly set, there is danger to the cargo and danger to the vessel. The comparable service of unloading, loading and stowing cargo in the hold of a ship has traditionally been regarded as constituting "maritime employment." *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52; *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Northern Coal Co.* v. *Strand*, 278 U. S. 142; *Employers' Liability Assurance Corp.* v. *Cook*, 281 U. S. 233. Yet it contains no more inherent possibilities of danger than placing a car on or removing a car from a car float. The loading of cargo into a freight car on a car

float has been held to be a maritime service, *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, although without the attendant danger to cargo and vessel involved in the instant case.

In the *Nogueira* case, likewise brought in the District Court under the Federal Employers' Liability Act, the judgment dismissing the complaint upon the ground that the Harbor Workers' Compensation Act was applicable and afforded an exclusive remedy, was affirmed by the Circuit Court of Appeals and by this Court. In that case the employee was injured when thrown to the floor of a car float belonging to the defendant railroad company. The float was used in transporting cars and at the time of the injury was lying in navigable waters at a pier in New York Harbor. The injured employee was one of a gang of railroad freight handlers, at the time of the injury, loading freight into one of the railroad cars. He was not stowing cargo in the hold of a vessel involving the safety of the ship. He was not a longshoreman loading cargo into a ship. He was a railroad employee, at the time loading freight into a railroad car on a car float for transportation and not for local storage. This Court, after referring to *Imbrovek*[2] and other cases, in a unanimous opinion, held that from the standpoint of maritime employment it obviously made no difference whether the freight was placed in the hold or on the deck of a vessel or whether the vessel was a car float or a steamship; that a car float in navigable waters is subject to maritime law like any other vessel; that a gang of railroad freight handlers in loading freight from the dock into one of the freight cars was engaged in maritime employment; that there was no distinction between loading and unloading in that respect, and that for an injury suffered on board the car float, the Harbor Workers' Compensation Act afforded an exclusive remedy.

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[2] *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52.

In that case the employee's duties were maritime, not because loading freight into a railroad car is inherently maritime, but because loading it into a car on a car float is an essential part of transportation by water. There is obviously no distinction between loading freight into a railroad car on a float and placing a freight car on the float in so far as the character of the employment is concerned. Each is essential to enable the car float to perform its maritime function.

Moreover a railroad freight car, when being loaded upon, transported by, or unloaded from a car float moving in interstate commerce and in and by navigable water, is maritime cargo and nothing more. The securing of that freight car on the car float involves the safety of cargo and vessel to a much greater extent than the traditional loading of a ship by longshoremen or stevedores. The fact that such a freight car had become a specialized cargo secured on the float principally by the application of its own brakes rather than by cables, ropes or other means, does not make it any less a maritime cargo and its stowage any less a maritime employment. Certainly one engaged in removing the safety protection at the end of the voyage by loosening the brakes to accomplish the unloading of the cars is also engaged in maritime employment. Nor can it make any difference that such cargo is removed on its own wheels instead of the wheels of a hand truck. Furthermore, in the instant case the transition of the car from maritime cargo to a freight train on land had not taken place. The engine and pusher had not even been coupled to the cars (R. 13). As stated by Circuit Judge Clark in his dissenting opinion: "the *Nogueira* case seems wholly controlling in both its reasoning and its holding" (R. 52).

Until the decision of the Court of Appeals below, it was generally thought to be settled that railroad employees on a car float engaged in loading into or removing cargo from cars on vessels or placing on or removing freight cars from car floats or car ferries, lying in navigable waters, were covered by the Harbor Workers' Compensation Act. *No-*

gueira v. *New York, N. H. & H. R. Co.*, 281 U. S. 128; *Buren* v. *Southern Pacific Co.*, 50 F. 2d 407 (9th Cir.), *cert. denied* 284 U. S. 638; *Gussie* v. *Pennsylvania R. Co.*, 1 N. J. Super. 293, 64 A. 2d 244, *cert. denied* 338 U. S. 869; *Richardson* v. *Central R. Co. of N. J.*, 233 App. Div. 603, 253 N. Y. S. 789; see also *Job* v. *Erie R. Co.*, 79 F. Supp. 698 (S.D.N.Y.).

The court below accordingly erred in holding that respondent was not engaged in "maritime employment"; and that the designation as brakeman bespeaks a specialized railroad employment quite apart from "maritime service" (R. 49, 51). In holding that releasing hand brakes is distinctively a railroader's job accompanied with particular risks peculiar to the business of railroading alone, the learned court completely overlooked the additional hazards in removing the cars, resulting, for example, from the ebb and flow of the tide and from the fact that navigable water generally is moving and not static. This additional risk was undoubtedly recognized by respondent trained as he was in stevedoring work (R. 8). The court below also seems to have been under the misapprehension that Nogueira was engaged in the traditional task of loading and stowing cargo in the vessel instead of placing freight in a freight car on a car float (R. 49).

The objection that respondent's maritime duties were part time only was answered in *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 247, in which this court overruled such an objection stating that such employees were expressly included in the Act. (§ 2(4), 33 U.S.C. § 902(4)).

There can be no doubt that petitioner was an employer within the meaning of the Harbor Workers' Compensation Act. Employers are defined in Section 2, subdivision (4) (33 U. S. C., § 902(4)) as follows: "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry

dock)." The term is not otherwise defined either with respect to the nature or the scope of the enterprises in which the employer is engaged. As the Chief Justice stated,[3] the definition is manifestly broad enough to embrace a railroad company, provided it has employees who "are employed in maritime employment, in whole or in part, upon the navigable waters of the United States"; and no exception is made of the employees of a railroad company in maritime service on navigable waters or with respect to the question whether such employment was in connection with an extension of railroad service.

As reported to and first passed by the Senate, the bill contained a provision in Section 3 excepting "an employee of a common carrier by railroad engaged in interstate or foreign commerce or in commerce within any Territory or the District of Columbia if the injury from which the disability or death results occurred while the employee was employed in such commerce." Senate Report No. 973, 69th Congress, First Session. This exception was eliminated from the bill as finally passed. Until Congress writes that exception into the Act, respondent and other such employees are within its exclusive coverage (§ 5, 33 U. S. C. § 905). It was suggested in the District Court that the said exception, eliminated by Congress, was in effect re-enacted by the 1939 amendment[4] to the Federal Employers' Liability Act, respondent citing *Zientek* v. *Reading Co.*, 93 F. Supp. 875 (E. D. Pa.) therefor. That argument was denied by Judge Kennedy (R. 41-42), abandoned in the Court of Appeals and disavowed by

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[3] *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, 132, 134.

[4] The amendment (53 Stat. 1404) added the following language to § 1 of the act (45 U. S. C. § 51): "'Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.'"

that court (R. 51, 53), after the decision in *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 190, in which case this Court said: "the Amendment has no effect on the 'right or remedy' of railway employees but merely redefines for the purposes of the Federal Employers' Liability Act the scope of the word 'employee' to include certain persons not theretofore covered, because they were not directly engaged in interstate or foreign commerce." Respondent was directly engaged in interstate or foreign commerce and accordingly the amendment did not affect his status.[5] The interpretation enunciated by the *Zientek* case has not been followed. *Job.* v. *Erie R. Co.*, 79 F. Supp. 698 (S. D. N. Y.); *Gussie* v. *Pennsylvania R. Co.*, 1 N. J. Super. 293, 64 A. 2d 244, *cert. denied* 338 U. S. 869; *Byrd* v. *New York Central System*, 6 N. J. Super. 568, 70 A. 2d 97; see also *Rist* v. *Pittsburgh and Conneaut Dock Co.*, 104 F. Supp. 29 (N. D. Ohio).

Since the instant case falls within the ambit of the decision in the *Nogueira* case, recovery for respondent's injury through state workmen's compensation proceedings may not validly be provided by state law.

The case accordingly is not within the twilight zone referred to in *Davis* v. *Department of Labor*, 317 U. S. 249.

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[5] See Senate Report No. 661, 76th Congress, First Session, commenting upon the 1939 amendment as follows: "'This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations. * * * The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic.'"

When Congress desired to eliminate railroad employees from the coverage of the Longshoremen's and Harbor Workers' Compensation Act, it did so expressly as in the act for the employees of the District of Columbia. Act of May 17, 1928, c. 612, 45 Stat. 600. See *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, 138.

In the *Davis* case, neither the employer nor the employee was shown to have been engaged in the business of transportation by water in interstate commerce, navigation or in any general maritime activity. The employer was a construction and engineering company and the employee a structural steel worker. The job undertaken by the employer and in which the employee was to assist "was to dismantle an abandoned drawbridge which spanned the river." A part of the task of the employee was to cut steel from the bridge to be lowered to a barge by which it was to be moved about 250 feet away for storage to await delivery to a local purchaser. The employee while on the barge was knocked or fell into navigable water. The entire enterprise was purely local in nature.[6] It had no concern

[6] The local nature of the activities involved in the *Davis* case and in the cases cited therein, page 253, footnote 2, is apparent: *Davis* v. *Department of Labor*, 317 U. S. 249 (structural steel worker employed by a construction and engineering company engaged in the dismantling of a bridge); *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469 (carpenter working on a partially completed vessel); *Alaska Packers Association* v. *Industrial Accident Commission*, 276 U. S. 467 (employee engaged as fisherman and for work in connection with canning operations on land injured pushing a small boat into navigable water); *Millers' Indemnity Underwriters Co.* v. *Braud*, 270 U. S. 59 (diver employed by a shipbuilding company removing timber from abandoned set of ways); *State Industrial Board of N. Y.* v. *Terry and Tench Co.*, 273 U. S. 639 (employee engaged in the construction of a pier); *Rosengrant* v. *Havard*, 273 U. S. 664 (lumber inspector grading and tallying lumber being removed from barges; *Sulton Ry. & Timber Co.* v. *Department of Labor*, 277 U. S. 135 (employee of lumber company assembling logs in booms for towage on a navigable river); *United States Casualty Co.* v. *Taylor*, 64 F. 2d 521 (4th Cir.), *cert. denied* 290 U. S. 639 (workman engaged in the construction of a newly launched, uncompleted ship); *New Amsterdam Casualty Co.* v. *McManigal*, 87 F. 2d 332 (2d Cir.) (carpenter employed by a construction company engaged in the construction of a lighthouse); *In Re Herbert's Case*, 283 Mass. 348, 186 N. E. 554 (employee of garbage disposal company sweeping the deck of a scow in navigable waters within the City of Boston); see also *Bethlehem Steel Co.* v. *Moores*, 335 U. S. 874 (shipyard employee repairing a ship in dry dock); *Baskin* v. *Industrial Accident Commission*, 338 U. S. 854 (shipyard employee ("materialman") working usually on shore or on ships under construction injured on a ship being repaired).

with maritime activity, at least beyond the locality involved. It was upon such facts and the presumption of validity of the state compensation act that this Court held that the determination of the administrative body that the case was purely of local concern should be sustained.[7] It was upon somewhat similar facts, that Justices Holmes, Stone and Brandeis dissented from the decision in *Baizley Iron Works* v. *Span*, 281 U. S. 222, 232, which denied relief under a state compensation act to a blacksmith helper, employed by the Iron Works, who was injured when painting angle irons on a vessel lying in navigable waters, on the same day that they concurred in the unanimous decision of this Court in the *Nogueira* case, *supra*.

In the instant case, the employer was engaged in navigation, in transportation by water in commerce between the states and the employee was performing a regular assignment assisting in such duties at the time of injury.

This Court has consistently held that the loading and unloading of vessels engaged in interstate or foreign commerce by water is employment of general maritime significance, and which in accordance with the provisions of the Constitution, Article III, Section 2, must be subjected to the exclusive maritime jurisdiction of the Federal Government. *Nogueira* v. *New York; N. H. & H. R. Co.*, 281 U. S. 128; *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Northern Coal Co.* v. *Strand*, 278 U. S. 142; *Employers' Liability Assurance Corp.* v. *Cook*, 281 U. S. 233; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52.

Moreover, the rights of the parties in the instant case have been defined by an administrative determination. Although not an adjudication in respondent's case, the United States Employees Compensation Commission, the administrative body charged by Congress with the enforcement of the Harbor Workers' Compensation Act (Opinion

[7] See also *Bethlehem Steel Co.* v. *Moores*, 335 U. S. 874.

29, January 20, 1928; 6 American Maritime Cases 413 (1928)), has ruled that "employees of a railroad company who go aboard vessels and render services in connection with putting on board, or taking off loaded or empty cars are engaged in maritime employment," and entitled to the exclusive remedy provided by the Act, a determination that we have been informed has been consistently followed.

Prior to the decision below, it was generally thought that a definite guide had been established for such workers. But now, notwithstanding the large number of railroad employees in all parts of the country, who have, for full or part time, assigned to them the duties of placing on and removing freight cars from ferries and car floats in and upon navigable rivers, harbors or lakes, the employers and employees are left "in a chartless morass" with no standard to guide them (R. 53). If the railroad employee is loading or unloading freight from a freight car on a car float, the Harbor Workers' Compensation Act is applicable and is his exclusive remedy, *Nogueira* v. *New York, N. H. & H. R. Co., supra,* 281 U. S. 128, but if he is assisting in unloading a car-float by releasing the hand brakes to remove the freight cars, he will not be entitled to such protection if the majority opinion below is sustained.

Now uncertainty has been substituted for certainty; indefiniteness for definiteness; insecurity for security. Moreover the decision involves a large class of employees throughout the country having identical or substantially similar duties in loading and unloading car floats, uniform in structure and in function, and necessarily so because of the compulsory interchange of freight cars, thereby furnishing an unusual opportunity to provide a workable standard for employers and employees.

Conclusion

The Longshoremen's and Harbor Workers' Compensation Act affords a remedy for respondent's injury on navigable waters while employed by petitioner in the maritime service of loading and unloading a car float, a vessel of more than 18 tons, used to transport freight cars in interstate commerce across navigable waters, and upon the proper performance of whose task depended the safety of the vessel. Respondent was not a member of the ship's crew and did not fall within the other exceptions of the Act. Since the remedy provided by the said Act is exclusive, the Federal Employers' Liability Act is not applicable. Such is the unanimous decision of this Court in the *Nogueira* case.

It is respectfully submitted that the judgment of the United States Court of Appeals should be reversed and that of the United State District Court affirmed.

Respectfully submitted,

JOHN VANCE HEWITT,
Attorney for Petitioner.

THOMAS F. AHRENSFELD,
of Counsel.

New York, N. Y., November 14, 1952.

Appendix

The relevant provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. §§ 901 *et seq*, are the following:

"§ 902. *Definitions.* When used in this chapter—

. . . . .

(3) The term 'employee' does not include a master or a member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.) . . . ."

"§ 903. *Coverage.* (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; . . . ."

"§ 904. *Liability for compensation.* (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this chapter. In the case

of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury."

"§ 905. *Exclusiveness of liability.* The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 60.

THE PENNSYLVANIA RAILROAD COMPANY,

Petitioner,

against

CHARLES E. O'ROURKE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONSE TO PETITION FOR REHEARING

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IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONSE TO PETITION FOR REHEARING

This action was brought by respondent, petitioner for rehearing herein, under the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C., §§ 51 *et seq.* and alleged a violation of the Safety Appliance Acts, 27 Stat. 531, 45 U. S. C., §§ 1 *et seq.* The United States District Court for the Eastern District of New York decided that the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C., §§ 901 *et seq.*, applied exclusively (99 F. Supp. 506; R. 40-44). The United States Court of Appeals reversed on the ground that the Liability Act covered "railroad employees injured while engaged in railroad work on navigable waters" and that respondent

was "not employed in maritime employment . . . within the meaning of the Compensation Act" (194 F. 2nd 612; R. 48-53). The petition for a writ of certiorari was filed on May 12, 1952, and was granted on October 13, 1952 (344 U. S. 811). This Court, on January 12, 1953, handed down its decision reversing the decision of the Court of Appeals and holding the Longshoremen's and Harbor Workers' Compensation Act applicable (—— U. S. ——, 73 S. Ct. 302).

Respondent, petitioner for rehearing herein, in urging this Court to grant a rehearing raises no arguments that were not heretofore urged, cites no cases not heretofore presented to this Court for its consideration, and asserts no changes of law or fact occurring since the decision of this Court.

The argument of respondent, now made on page 2 of his petition for rehearing, to the effect that this Court has recognized the hazards of operational railroading and has liberally construed the Liability Act and the Safety Appliance Acts for the benefit of employees, was made on pages 4, 10 and 11 of his main brief, wherein the same decisions were cited, to wit, *Urie* v. *Thompson*, 337 U. S. 163, *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481 and *Coray* v. *Southern Pac. Co.*, 335 U. S. 520.

The doctrine with respect to a "twilight zone" was called to the attention of District Judge Kennedy by plaintiff and considered in the District Court opinion (R. 40, 43-44). It was considered at some length in the main brief of petitioner, respondent on this application, pages 12-14. The cases of *Davis* v. *Department of Labor*, 317 U. S. 249, *Bethlehem Steel Company* v. *Moores*, 335 U. S. 874 and *Baskin* v. *Industrial Accident Commission*, 338 U. S. 854, relied upon in the application for rehearing *sub nom. Kaiser Co.* v. *Baskin*, 340 U. S. 886, and many others were therein cited and discussed. Upon the oral argument before this Court, counsel for petitioner and counsel for

respondent were each asked whether this case required the application of the said doctrine, and both counsel answered in the negative. The applicability of the doctrine was also considered by this Court (—— U. S. ——, 73 S. Ct. 302, 306, note 8). Moreover, the question whether the loading or unloading of freight cars from a car float, moored in navigable waters, is railroad employment or maritime employment was considered at length both in the main brief of petitioner, respondent on this application, pages 7-10, 14-15, and the main brief of respondent, pages 4-10, 12.

As this Court held, this case falls within the ambit of its decision in *Nogueirà* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, and the Longshoremen's and Harbor Workers' Compensation Act is accordingly applicable.

It is respectfully submitted that the petition for rehearing should be denied.

JOHN VANCE HEWITT,
Attorney for Petitioner,
Respondent herein.

THOMAS F. AHRENSFELD,
of Counsel.

New York, N. Y., January 29, 1953.

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IN THE

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OCTOBER TERM 1952

No. 767 60

THE PENNSYLVANIA RAILROAD COMPANY,
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CHARLES E. O'ROURKE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR CHARLES E. O'ROURKE IN OPPOSITION

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IN THE

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Petitioner,

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CHARLES E. O'ROURKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR CHARLES E. O'ROURKE IN OPPOSITION

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (R. 59-64) is reported at 194 F. 2d 612. The opinion of the District Court (R. 44-49) is reported at 99 F. Supp. 506.

Jurisdiction

The judgment of the United States Court of Appeals was entered February 26, 1952 (R. 64-65). The petition for

a writ of certiorari was filed May 12, 1952. The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254.

Statutes Involved

The statutes involved are the *Federal Employers' Liability Act* (45 U. S. C. A. Sec. 51 et seq.), *Safety Appliance Acts* (45 U. S. C. A. Sec. 1 et seq.) and the *Longshoremen's and Harbor Worker's Compensation Act* (33 U. S. C. A. Sec. 901 et seq.).

Statement

Respondent filed a complaint in the United States District Court for the Eastern District of New York seeking to recover money damages on account of injuries received. The complaint was based upon the Federal Employers' Liability Act, *supra,* and alleges a violation of the Safety Appliance Acts, *supra,* in that respondent's injuries were caused by a defective and inefficient hand brake on one of petitioner's freight cars. Petitioner moved to dismiss the complaint under the Federal Rules of Civil Procedure, Rules 12b (6), 56b and 56d. This motion (R. 37-38) was based upon the pleadings (R. 7-9), the deposition of respondent (R. 10-36), affidavit of counsel in support of the motion (R. 39-41) and affidavit of counsel in opposition to the motion (R. 42-43). The District Court held that the provisions of the Longshoremen's and Harbor Worker's Compensation Act, *supra,* hereinafter referred to as "Compensation Act", were applicable and that respondent's remedy thereunder was exclusive (R. 44-49).

The United States Court of Appeals for the Second Circuit reversed, with the majority opinion holding that respondent was a railroad employee injured while engaged in distinctive railroad work and was not employed in maritime employment at the time of his injury within the meaning of the Compensation Act so as to limit his rights thereby (R. 59-62).

As conceded by the petitioner, it employed respondent as a railroad freight brakeman in its yards at Jersey City, New Jersey (R. 19, 39). He was a regular member of a railroad drill crew consisting of an engineer, fireman, conductor and two freight brakemen (R. 14). Their job was to make up freight cars into trains in the petitioner's yard (R. 12). In these operations, respondent's duties concerned themselves only with the movement of trains and cars and the routine railroad procedures in connection therewith. This was the only type of work in which he participated and for which he was trained by the petitioner (R. 12).

From time to time, respondent's duties, as above noted, required him to work on car floats (R. 12). At the time he was injured he and his crew were preparing to move some freight cars from a car float moored in navigable waters. They proceeded onto the car float with a pusher engine and coupled to the lead car (R. 15). Respondent, as was his duty, then proceeded to release the hand brake on the cars on the float. When and if his duties as a freight brakeman took him upon car floats, his only tasks were to release hand brakes or "pull the pin or couple up" (R. 13). It was while attempting to release the brake on one of these cars that he was injured (R. 22-25). As alleged in his complaint (R. 5), respondent was caused, by reason of the defective and inefficient condition of the brake, in violation of the Safety Appliance Act, *supra*, to be precipitated from the car to the platform below. He sustained severe and permanent injuries.

Argument

The undisputed facts establish that respondent was a freight brakeman employed in operational railroading at the time of his injury. He was thereby engaged as a matter of law in railroad employment—an employment accompanied with the particular risks pertinent to the business of railroading. Accordingly, the Compensation Act does not apply and respondent must be allowed to proceed to enforce his substantial rights under the Federal Employers' Liability Act and Safety Appliance Act. To hold otherwise would be to disregard the constant and established course of liberal construction of these Acts followed by this Court. See *Urie* v. *Thompson*, 337 U. S. 163, 181-182 and *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481, 486.

The Compensation Act (Sections 902(4) and 903(a)) by indirection at least, includes within its coverage only those employees engaged in maritime employment who are injured upon navigable waters. These two factors—maritime employment and injury upon navigable waters—are separate and distinct provisions, each of which must be shown to exist before the Act applies. That an injury occurred upon navigable waters does not in and of itself require a finding of maritime employment. On this subject the position of this Court was made clear in *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128. It being conceded therein that Nogueira was injured upon navigable waters, the question was whether he was engaged in maritime employment. The *Nogueira* opinion relied heavily upon two cases to show that he was: *Atlantic Transport Company of West Virginia* v. *Imbrovek*, 244 U. S. 52 and *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, both of which held that the work of a stevedore in loading a ship was maritime in its nature and that he was thereby brought within admiralty jurisdiction. On this reasoning Nogueira, who was a freight handler actually doing the work of a

stevedore in loading freight into railroad cars on a float, was held to be engaged in maritime employment; accordingly, his exclusive remedy was under the Compensation Act. Concededly, this decision followed the purpose of Congress in legislating the Compensation Act; "* * * the purpose of the legislation (the Compensation Act) was to provide compensation for those who are mainly employed in loading, unloading, fitting and repairing ships", *Norton* v. *Warner Co.*, 321 U. S. 565, 569-570. Nogueira was obviously doing stevedoring work; the respondent here just as obviously was not so engaged but was in every respect performing the duties of an operational railroader. His was the very occupation and employment that the Federal Employers' Liability Act and Safety Appliance Acts were designed to protect. The purpose of the Federal Employers' Liability Act was to prescribe "a rule applicable where the parties are engaged in something having direct and substantial connection with railroad operations, and not with another kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct thereto", *Southern Pacific Company* v. *Jensen*, *supra*. In this case respondent was unquestionably employed in "something having direct and substantial connection with railroad operations". *His work consisted literally and solely of running trains.* He was not doing stevedoring nor longshoreman's work nor engaged in maritime employment within the meaning of the Compensation Act and the decisions of this Court to which reference has been above made.

The decision of the district court was based upon the thesis that since the tort committed against respondent occurred over navigable waters it was therefore maritime and subject exclusively to the Compensation Act. No regard was given to the nature of his employment. It was urged that this "locality test" was the only "true meaning" to be derived from the *Nogueira* case, and that the precise task in which a "railroader" is engaged is immaterial (R. 48-49). Even the dissenting opinion in the

circuit court disagrees with this, for there it is stated that "it was his 'actual duties' at the time which controlled" (R. 64). It is obvious that under the Compensation Act the locus of the accident being on navigable waters is only one of two conditions that must be fulfilled before the remedy provided therein becomes exclusive. The other is the condition of maritime employment. When the *Nogueira* case was before the Circuit Court of Appeals for the Second Circuit (32 F. 2d 179), Judge Swan writing the opinion, it was stated: *"Moreover, it does not follow that the mere locus of the accident necessarily determines the right"* (at p. 182). There was no language in this Court's opinion in the same case which adversely affected that statement. A fortiori, this Court has affirmatively held that the fact that an employee is over navigable waters when injured does not itself determine that he is engaged in maritime employment. See *Grant Smith-Porter Co. v. Rohde*, 247 U. S. 469; *Rosengrant* v. *Havard*, 273 U. S. 664. In this case it is conceded that respondent's only duties were concerned with the releasing of handbrakes on railroad freight cars, or the coupling and uncoupling of these cars. This was a distinctive operational railroad activity relating only to the business of railroading. To conclude that the instant his railroad activities required him to step from land aboard a car float his employment automatically became maritime is to ignore reality. Such a conclusion can be reached only by making the locality of the accident the sole test of maritime employment. This reasoning finds no basis in the various statutes involved herein, in the intent of Congress nor in the decisions of this Court.

Petitioner's arguments both in the district court and the circuit court relied exclusively on the theory that merely because the locus of the accident was upon navigable waters respondent's only remedy was under the Compensation Act. Petitioner, at least tacitly, concedes now that this is only one of two conditions which must be fulfilled before the Act applies and that the nature of respondent's employment must also be shown to be maritime. In this re-

gard it is pertinent to note that the dissenting opinion in the circuit court apparently agrees with the majority opinion in every respect except as to the nature of this respondent's employment. As already noted the dissent states that it was respondent's actual duties at the time which controlled. And yet in almost the same breath his employment is categorized as being maritime apparently for no other reason than the fact that at the time of his injury he was physically over navigable waters. Reliance is placed on this Court's decision in *Parker* v. *Motor Boat Sales*, 314 U. S. 244. That case concerned a person employed as a janitor who was injured while actually operating a motor boat on navigable waters. If anything that case sustains respondent's position here, for the injured person in the *Parker* case was without question performing a maritime service. He was actually operating a boat. This is far different from operating a railroad freight car. It is inconceivable that the latter employment could be construed as maritime. The dissenting opinion in the circuit court here also relied upon this Courts' decision in *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251. In determining whether an injured person was an employee within the coverage of the Compensation Act it was there held that "the question concerns his actual duties." What was the primary duty? See also *Merritt-Chapman & Scott Corp. et al.* v. *Willard et al.*, 2 Cir., 189 F. 2d 791. Here the respondent's conceded duties were actually and primarily those of an operational railroad freight brakeman. In *Baizley Iron Works* v. *Span*, 281 U. S. 222, 230, the question was whether an employee doing repair work was engaged in maritime service. In holding that he was this Court observed that;

> "What work has *direct* relation to navigation or commerce must, of course, be determined in view of surrounding circumstances as cases arise." (Emphasis supplied.)

In view of respondent's conceded actual and primary duties as a freight brakeman it is clear that his work had no relation whatsoever to navigation or commerce upon navigable waters. His physical presence on a moored car float does not change the character of his duties.

In the recent case of *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 96, this Court stresses the fact that historically the work of a stevedore was a maritime service performed until recent times by members of the ship's crew. This same thesis was actually the basis of the decision in the *Nogueira* case. Petitioner now abandons the "locality test" theory it relied on in the lower courts and urges here that respondent's duties were essentially the same as those of the stevedore in the *Nogueira* case. Yet it is conceded that respondent was a freight brakeman whose only duties were in connection with the operation of railroad freight cars. Clearly the work of a brakeman engaged in operational railroading cannot properly be held to be a service formerly rendered by a ship's crew. It is completely disassociated from maritime service.

The *Safety Appliance Act, supra*, makes it unlawful for a railroad to provide its cars with other than efficient hand brakes. Respondent alleges in his complaint (R. 5) that he suffered his injury because of a violation of this Act. The recent case of *Coray* v. *Southern Pac. Co.*, 335 U. S. 520, was concerned with a violation of the Act because of a defective brake. The decision is highly pertinent here in that it clearly indicates those railroad employees whom the Act is intended to protect. This Court had this to say, at pages 522-524:

> "And this Act (Safety Appliance), fairly interpreted, *must be held to protect all who need protection* from dangerous results due to maintenance or operation of congressionally prohibited defective appliances. Liability of a railroad under the Safety Appliance Act for injuries inflicted as a result of the Act's violation follows from the unlawful use of prohibitive defective equipment '*not from the position*

the employee may be in or the work which he may be doing at the moment when he is injured'." (Emphasis supplied.)

* * * * * *

"The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretive purpose."

In simple and unambiguous language this Court has said that no matter where an employee is working, no matter what type of work he may be doing at the moment he is injured, his employer railroad company is liable for injuries suffered as a result of the Act's violation. This language clearly provides for no exceptions. Petitioner has persistently ignored this concise statement of law in the district court, the circuit court and here. Nor may it escape liability thereunder "by the introduction of dialectical subtleties" whereby it has attempted to disguise the nature of respondent's employment.

Respondent was not engaged in maritime employment and therefore the Longshoremen's and Harbor Workers' Compensation Act has no application to this case. The decision of the Court of Appeals is in no way in conflict with the decision of this Court in *Nogueira* v. *New York, N. H. & H. R. Co., supra*, since the facts differ as to the nature of the employment in the two cases. Likewise there is no conflict as to the applicable principles applied by the Court of Appeals for the Second Circuit and those applied by the Court of Appeals for the Ninth Circuit in *Buren* v. *Southern Pacific Co.*, 50 F. 2d 407, cert. denied, 284 U. S. 638. In the *Buren* case the employee's duties required him to ride a ferryboat across navigable waters in addition to his duties as a brakeman. In that regard there can be no question but that his duties were in part maritime. On the facts the two cases differ as to the nature of the employment of the respective employees. In view of the clear language of the

pertinent statutes and the distinct principles set forth by this Court in *Nogueira v. New York, N. H. & H. R. Co., supra,* and *Coray v. Southern Pac. Co., supra,* it is respectfully urged that there is no question of Federal law which need be resolved by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

HERBERT ZELENKO,
RICHARD C. MACHCINSKI,
Attorneys for Respondent.

New York, N. Y. June 12, 1952.

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Petitioner,

v.

CHARLES E. O'ROURKE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (R. 48-53) is reported at 194 F. 2d 612. The opinion of the District Court (R. 40-44) is reported at 99 F. Supp. 506.

Jurisdiction

The judgment of the United States Court of Appeals was entered February 26, 1952 (R. 53-54). The petition for a writ of certiorari was filed on May 12, 1952, and was granted on October 13, 1952 (R. 55). Jurisdiction is conferred upon this Court to review this case by writ of certiorari under Title 28, United States Code, Section 1254.

Question Presented

The question presented is whether a freight brakeman employed by a railroad and engaged in interstate commerce may invoke the *Federal Employers' Liability Act*, 45 U. S. C. A. Sec. 51 et seq., and the *Safety Appliance Acts*, 45 U. S. C. A. Sec. 1 et seq., when he was injured in the performance of operational railroad duties upon a car float moored in navigable waters.

Statutes Involved

The statutes involved are the *Federal Employers' Liability Act*, 45 U. S. C. A. Sec. 51 et seq., *Safety Appliance Acts*, 45 U. S. C. A. Sec. 1 et seq., the pertinent provisions of both of which are set forth in the Appendix (*infra*, p. 14), and the *Longshoremen's and Harbor Workers' Compensation Act*, 33 U. S. C. A. Sec. 901 et seq., hereinafter sometimes referred to as the Compensation Act, and the pertinent provisions of which are set out as an Appendix to petitioner's brief.

Statement

Respondent filed a complaint (R. 3-5) in the United States District Court for the Eastern District of New York seeking to recover money damages on account of injuries received. The complaint was based upon the Federal Employers' Liability Act, *supra*, and alleges a violation of the Safety Appliance Acts, *supra*, in that respondent's injuries were caused by a defective and inefficient hand brake on one of petitioner's freight cars. Petitioner moved to dismiss the complaint under the Federal Rules of Civil Procedure, Rules 12b(6), 56b and 56d. This motion (R. 35) was based upon the pleadings (R. 3-7), the deposition of respondent (R. 7-34), affidavit of counsel

in support of the motion (R. 36-38) and affidavit of counse in opposition to the motion (R. 38-40). The District Cour held that the provisions of the Longshoremen's and Harbo Workers' Compensation Act, *supra*, were applicable an that respondent's remedy thereunder was exclusive (R 40-44).

The United States Court of Appeals for the Secon Circuit reversed, with the majority opinion holding tha respondent was a railroad employee injured while engage in distinctive railroad work and was not employed in mari time employment at the time of his injury within the mean ing of the Compensation Act so as to limit his rights thereb (R. 48-51).

As conceded by the petitioner, it employed respondent as a railroad freight brakeman in its yards at Jersey City New Jersey (R. 5, 36). He was a regular member of a railroad drill crew consisting of an engineer, fireman, conductor and two freight brakemen (R. 11). Their job was to make up freight cars into trains in the petitioner's yard (R. 9-10). In these operations, respondent's duties concerned themselves only with the movement of trains and cars and the routine railroad procedures in connection therewith. This was the only type of work in which he participated and for which he was trained by the petitioner (R. 9). Petitioner's characterization of respondent as a trained stevedore (Brief p. 10) is based on respondent's several months' employment as a loader by a third party prior to 1942 (R. 8). Subsequently, and prior to his accident, he had six years of training and experience with the petitioner as a railroad freight brakeman and did no stevedoring work (R. 9).

From time to time respondent's duties, as above outlined, required him to work on car floats (R. 9). At the time he was injured he and his crew were preparing to move some freight cars from a car float moored in navigable waters. They proceeded onto the car float with a pusher engine and coupled to the lead car (R. 13). Respondent,

as was his duty, then proceeded to release the hand brakes on the cars on the float. When and if his duties as a freight brakeman took him upon car floats, his only tasks were to release hand brakes or "pull the pin or couple up" (R. 10). It was while attempting to release the brake on one of these cars that he was injured (R. 19-23). As alleged in his complaint (R. 4), respondent was caused, by reason of the defective and inefficient condition of the brake, in violation of the Safety Appliance Act, *supra,* to be precipitated from the car to the platform below. He sustained severe and permanent injuries.

ARGUMENT

Respondent was a railroad employee whom the Safety Appliance Act was intended to protect, and, having suffered injury through its violation, he may bring suit against his railroad employer under the Federal Employers' Liability Act.

The undisputed facts establish that respondent was a freight brakeman employed in operational railroading at the time of his injury. He was thereby engaged, as a matter of law, in railroad employment—an employment accompanied with the particular risks pertinent to the business of railroading. Accordingly, the Compensation Act does not apply and respondent must be allowed to proceed to enforce his substantial rights under the Federal Employers' Liability Act and Safety Appliance Act, *supra.* To hold otherwise would be to disregard the constant and established course of liberal construction of these Acts followed by this Court. See *Urie* v. *Thompson,* 337 U. S. 163, 181-182, and *Lilly* v. *Grand Trunk Western R. Co.,* 317 U. S. 481, 486.

The Compensation Act (Sections 902(4) and 903(a)), by indirection at least, includes within its coverage only those employees engaged in maritime employment who are

injured upon navigable waters. These two factors—maritime employment and injury upon navigable waters—are separate and distinct provisions, each of which must be shown to exist before the Compensation Act applies. The fact that an injury occurred upon navigable waters does not in and of itself require a finding of maritime employment. On this subject the position of this Court was made clear in *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128. It being conceded therein that Nogueira was injured upon navigable waters, the only question was whether he was engaged in maritime employment. The *Nogueira* opinion relied heavily upon two cases to show that he was: *Atlantic Transport Company of West Virginia* v. *Imbrovek*, 244 U. S. 52, and *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, both of which held that the work of a stevedore in loading a ship was maritime in its nature and that he was thereby brought within admiralty jurisdiction if injured over navigable waters. On this reasoning Nogueira, who was a railroad freight handler actually doing the work of a stevedore in loading freight into railroad cars on a float, was held to be engaged in maritime employment; accordingly, his exclusive remedy was under the Compensation Act.

Concededly, the *Nogueira* decision followed the purpose of Congress in legislating the Compensation Act. As this Court stated in *Norton* v. *Warner Co.*, 321 U. S. 565, 569-570: "The Senate Report (S. Rep. No. 973, 69th Cong., 1st Sess., p. 16) makes clear that 'The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as longshoremen. These men are mainly employed in loading, unloading, refitting, and repairing ships'". Nogueira, though a railroad employee, was obviously doing the work of a longshoreman or stevedore; the respondent here, just as obviously, was not so engaged but was in every respect performing the duties of an operational railroader. His was the very occupation and employment that the Federal

Employers' Liability Act and Safety Appliance Acts were designed to protect. The purpose of the Federal Employers' Liability Act was to prescribe "a rule applicable where the parties are engaged in something having direct and substantial connection with railroad operations, and not with another kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct thereto". *Southern Pacific Company* v. *Jensen, supra*, p. 213. In this case respondent was unquestionably employed in "something having direct and substantial connection with railroad operations". His work consisted literally and solely of running trains. He was not doing stevedoring nor longshoremen's work, nor engaged in maritime employment within the meaning of the Compensation Act and the decisions of this Court to which reference has been made above.

It is of interest to note that because of the Constitution, Article III, Section 2, state law could not provide compensation to longshoremen. To fill this gap the Compensation Act was passed. *Norton* v. *Warner Co., supra.* Nogueira and other railroad employees doing longshoremen's work thus could not qualify for state compensation. In addition, since this was before the 1939 amendment to the Federal Employers' Liability Act (Appendix, *infra*, p. 14), unless they were actually engaged in interstate commerce at the time of injury they had no remedy under that Act either. There were many situations where no remedy whatsoever was available to this class of railroad employee. Operational railroaders, such as the respondent, were not at the same disadvantage. Their rights, then and now, under the Federal Employers' Act and Safety Appliance Acts were, and are, clear and unequivocal. Because of this it is difficult to comprehend what reason, if any, Congress could have for intending, under any circumstances, to place them within the coverage of the Compensation Act. Congress placed no exception within the provisions of the Compensation Act for this class of employees because they already

had complete and substantial remedies provided for them by federal statutes.

The decision of the District Court in this case was based upon the thesis that since the tort committed against respondent occurred over navigable waters it was therefore maritime and subject exclusively to the Compensation Act. No regard was given to the nature of his employment. It was urged that this "locality test" was the only "true meaning" to be derived from the *Nogueira* case, and that the precise task in which a "railroader" is engaged is immaterial (R. 43-44). Even the dissenting opinion in the Circuit Court disagrees with this, for there it is stated that "it was his 'actual duties' at the time which controlled" (R. 53). It is obvious that under the Compensation Act the locus of the accident being on navigable waters is only one of two conditions that must be fulfilled before the remedy provided therein becomes exclusive. The other is the condition of maritime employment. When the *Nogueira* case was before the Circuit Court of Appeals for the Second Circuit (32 F. 2d 179), Judge Swan writing the opinion, it was stated (p. 182): "*Moreover, it does not follow that the mere locus of the accident necessarily determines the right*" (emphasis supplied). There was no language in this Court's opinion in the same case which adversely affected that statement. A fortiori, this Court has affirmatively held that the fact that an employee is over navigable waters when injured does not itself determine that he is engaged in maritime employment. See *Grant Smith-Porter Co.* v. *Rohde*, 247 U. S. 469; *Rosengrant* v. *Havard*, 273 U. S. 664. In this case it is conceded that respondent's only duties were concerned with the releasing of hand brakes on railroad freight cars, or the coupling and uncoupling of these cars. This was a distinctive operational railroad activity relating only to the business of railroading. To conclude that the instant his railroad activities required him to step from land aboard a car float his employment automatically became maritime is to ignore reality. Such a conclusion can be reached only

by making the locality of the accident the sole test of maritime employment. This reasoning finds no basis in the various statutes involved herein, in the intent of Congress nor in the decisions of this Court.

Petitioner's arguments both in the District Court and the Circuit Court relied exclusively on the theory that merely because the locus of the accident was upon navigable waters respondent's only remedy was under the Compensation Act. Petitioner, at least tacitly, concedes now that this is only one of two conditions which must be fulfilled before the Act applies and that the nature of respondent's employment must also be shown to be maritime. In this regard it is pertinent to note that the dissenting opinion in the Circuit Court apparently agrees with the majority opinion in every respect except as to the nature of this respondent's employment. As already noted, the dissent states that it was respondent's actual duties at the time which controlled. And yet in almost the same breath his employment is categorized as being maritime apparently for no other reason than the fact that at the time of his injury he was physically over navigable waters. Reliance is placed by petitioner on this Court's decision in *Parker* v. *Motor Boat Sales*, 314 U. S. 244. That case concerned a person employed as a janitor who was injured while actually operating a motor boat on navigable waters. If anything, that case sustains respondent's position here, for the injured person in the *Parker* case was without question performing a maritime service. He was actually operating a boat. This is far different from operating a railroad freight car. It is inconceivable that the latter employment could be construed as maritime.

The dissenting opinion in the Circuit Court here also relied upon this Court's decision in *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251. In determining whether an injured person was an employee within the coverage of the Compensation Act it was there held that "The question concerns his actual duties". What was the

primary duty? See also *Merritt-Chapman & Scott Corp. et al.* v. *Willard et al.*; 2 Cir., 189 F. 2d 791. Whether a given employee is a member of a ship's crew or whether he is a harbor worker depends on the nature of his duties. In distinguishing, therefore, between railroad employment and maritime employment the same logic should be applied. The fact that the Compensation Act provides a specific exception as to the coverage of members of a ship's crew is of no moment inasmuch as, if only by indirection, a railroad employee not engaged in maritime employment is also excepted. Applying the reasoning of the *Bassett* case to the respondent here, the conclusion is inescapable as to the non-maritime nature of his employment.

In *Baizley Iron Works* v. *Spun*, 281 U. S. 222, 230, the question was whether an employee doing repair work was engaged in maritime service. In holding that he was this Court observed that:

> "What work has *direct* relation to navigation or commerce must, of course, be determined in view of surrounding circumstances as cases arise." (Emphasis supplied.)

In view of respondent's conceded actual and primary duties as a freight brakeman it is clear that his work had no relation whatsoever to navigation or commerce upon navigable waters. His physical presence on a moored car float does not change the character of his duties, either in whole or in part. Petitioner's contention that unloading cargo from a ship or car float is the same thing as running a railroad car off a car float is merely a play on words. Respondent's employment as a member of a drill crew was to make up freight cars into trains in the petitioner's freight yard (R. 9-10). Whether these cars were in a roundhouse, on a spur track, in a repair shop, on a side track, or on a moored car float, their assembly and formation in a train was a distinctive railroad procedure completely foreign in its nature to maritime service. Two entirely different modes of transportation are involved.

In the recent case of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 96, this Court stresses the fact that historically the work of a stevedore was a maritime service performed until recent times by members of the ship's crew. The work "has become a specialized service devolving upon a class as clearly identified with maritime affairs as are the mariners". *Atlantic Transport Co.* v. *Imbrovek, supra.* This same thesis was actually the basis of the decision in the *Nogueira* case. Petitioner now abandons the "locality test" theory it relied on in the lower courts and urges here that respondent's duties were essentially the same as those of the stevedore in the *Nogueira* case. Yet it is conceded that respondent was a freight brakeman whose only duties were in connection with the operation of railroad freight cars. The work of a brakeman engaged in operational railroading cannot properly be held to be a service formerly rendered by a ship's crew. It is completely disassociated from maritime service.

The Safety Appliance Act, *supra*, makes it unlawful for a railroad to provide its cars with other than efficient hand brakes. Respondent alleges in his complaint (R. 4) that he suffered his injury because of a violation of this Act. The recent case of *Coray* v. *Southern Pac. Co.*, 335 U. S. 520, was concerned with a violation of the Act because of a defective brake. The decision is highly pertinent here in that it clearly indicates those railroad employees whom the Act is intended to protect. This Court had this to say at pages 522-524:

> "And this Act (Safety Appliance), fairly interpreted, *must be held to protect all who need protection* from dangerous results due to maintenance or operation of congressionally prohibited defective appliances. Liability of a railroad under the Safety Appliance Act for injuries inflicted as a result of the Act's violation follows from the unlawful use of prohibitive defective equipment *not from the position the employee may be in or the work which he may be doing at the moment when he is injured*'." (Emphasis supplied.)
>
> * * * * * *

"The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful purpose."

In simple and unambiguous language this Court has said that no matter where an employee is working, no matter what type of work he may be doing at the moment he is injured, his employer railroad company is liable for injuries suffered as a result of the Act's violation. This language permits no exceptions. Petitioner has persistently ignored this concise statement of law in the District Court, the Circuit Court and here. Nor may it escape liability thereunder "by the introduction of dialectical subtleties" whereby it has attempted to disguise the nature of respondent's employment.

The effect of the Circuit Court's decision here is not to substitute uncertainty for certainty, as petitioner contends, nor to lead us into a "chartless morass" as the dissenting opinion below suggests. Exactly the opposite is true. If these railroad trainmen are relegated to coverage under the Compensation Act, in fact situations such as we have here, the result would be that their available remedies might vary from minute to minute, or even from second to second. This is so because they will gain or lose a remedy according to the particular service they are rendering at the very moment of their injury. If petitioner's contention is correct a result such as that in the following hypothetical case would occur: Two brakemen, members of a drill crew, are injured at the same time when the boiler of their locomotive explodes. The locomotive is on land at dockside removing freight cars from a car float. One brakeman is on land; the other is a stride away on the car float. The brakeman on land would have recourse to the substantial benefits of the Federal Employers' Liability Act and the Safety Appliance Acts. The brakeman on the car float, so petitioner contends, would be covered

by the Compensation Act. Such a result would be unjust and illogical. Congress never intended, in passing the legislation involved here, that such a result should follow.

CONCLUSION

The principle that torts occurring upon navigable waters determine admiralty jurisdiction is not in question here. The problem is as to which one of several Federal statutes is to be held applicable to the respondent. The Compensation Act was designed to protect those engaged in maritime employment whereas the Federal Employers' Liability Act and Safety Appliance Acts were designed to protect those engaged in railroad employment. It is respondent's contention that the *Nogueira* case was decided upon the principle that to qualify under the Compensation Act a railroad employee must necessarily be engaged in maritime employment. Whether or not an employee is so engaged depends upon the facts in each case and is to be determined by an inquiry as to what his actual duties were. Of assistance in making this determination is the dicta in *Southern Pacific Company* v. *Jensen, supra,* to the effect that railroad employment is "something having direct and substantial connection with railroad operations". As compared to this there is the inference logically to be deduced from *Seas Shipping Co.* v. *Sieracki, supra,* and *Atlantic Transport Company* v. *Imbrovek, supra,* that maritime service is that service traditionally rendered by a ship's crew. The undisputed facts and the inferences fairly to be drawn therefrom establish as a matter of law that the respondent here was engaged in railroad employment as distinguished from maritime employment. Accordingly, the Compensation Act does not apply and the respondent should be allowed to proceed to enforce his substantial rights under the Federal Employers' Liability Act and Safety Appliance Act.

It is respectfully urged that the judgment of the United States Court of Appeals should be affirmed.

Respectfully submitted,

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RICHARD C. MACHCINSKI,
of Counsel.

New York, N. Y., November 28, 1952.

APPENDIX

The relevant provisions of the Federal Employers' Liability Act, 45 U. S. C. A. Sec. 51 et seq., and the Safety Appliance Act, 45 U. S. C. A. Sec. 1 et seq., are as follows:

"Section 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (Note 1.)

"Section 11. Safety appliances required for each car; when handbrakes may be omitted."

"* * * All cars must be equipped with secure sill steps and efficient handbrakes * * *."

(Note 1.) 1939 Amendment; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, added last paragraph, defining employee.

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IN THE

Supreme Court of the United States

October Term, 1952. No. 60.

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

CHARLES E. O'ROURKE,
Respondent.

ON PETITION FOR REHEARING.

PETITION AND BRIEF, AMICI CURIAE, OF ORDER OF RAILWAY CONDUCTORS, PENNSYLVANIA RAILROAD LINES EAST; BROTHERHOOD OF LOCOMOTIVE ENGINEERS, HUDSON & MANHATTAN RAILROAD COMPANY; BROTHERHOOD OF LOCOMOTIVE ENGINEERS, READING COMPANY.

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MISCELLANEOUS

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The above named labor unions beg leave to intervene and file a brief, amici curiae, because of the immense importance of the issue involved.

The Jones Act, 46 U. S. C. A. 688, *Federal Employers' Liability Act*, 45 U. S. C. A. 51, *The Longshoremen's and Harbor Workers' Compensation Act*, 33 U. S. C. A. 901, and the several state workmen's compensation acts were all written to help and protect employees. They are the legislative expression of the need for protection for work sustained disabilities in industry.

They were not written to help or aid or protect employers.

Progressively the protection by amendments has been extended, increased and broadened to meet the challenge of judge conceived restrictions and limitations produced by conceptualistic and narrowed reasoning and technical legalisms.

We must assume that Congress is always aware of these decisions and the resultant effect of these decisions as they affect the protection with which Congress sought to envelop employees in interstate commerce.

As the significance of each new decision in the several courts as well as in this court became apparent, applause or a hue and cry emanated from the group of employees favorably or adversely affected.

The Federal Employers' Liability Act as written in 1908 left much to be desired. Social consciousness had not then yet progressed far enough from the laissez-faire doctrine of economics of the preceding period to induce that Congress to eliminate assumption of risk as a defense. Nor had that Congress the foresight to envision the cunning and ingenuity with which counsel representing the carriers

would successfully twist that defense so that many seriously injured railroad employees would fail to be protected for these work-sustained injuries.

As the Federal Employers' Liability Act was then written, and as its tortured, twisted and maimed body then rested, little wonder exists that when in 1927 Congress sought a statute to provide protection for another totally separate and distinguishable group of men—Harborworkers and Longshoremen—that Congress did not place those men under the same weak and leaky protective coverage as the emasculated Federal Employers' Liability Act had as of that date become.

As of 1927, the coverage of the several state workmen's compensation acts had proven far superior to the Federal Employers' Liability Act. Hence, little surprise should be evinced because Congress wrote a compensation act for those harborworkers and longshoremen rather than Federal Employers' Liability Act type of coverage.

And it is with no surprise that the fighting liberals who sat on this bench when *Nogueira vs. N. Y. N. H. & H. R. Co.*, 281 U. S. 128, was decided, extended themselves to help longshoremen employed by railroad companies, by putting them under the assured recovery provided by the Longshoremen's and Harbor Workers' Compensation Act, rather than expose them to the then existing vicissitudes of the Federal Employers' Liability Act. They there placed railroad-employed longshoremen under the Longshoremen's and Harbor Workers' Compensation Act. This Court had held that longshoremen injured on vessels were not under local state compensation laws. *S. P. Co. vs. Jensen*, 244 U. S. 205.

By 1939, a warm and genial atmosphere of understanding and friendliness existed in Congress toward labor. The unfortunate state into which railroad-injury coverage had fallen then came into sharp focus. Too many leaks had made a sieve of the Federal Employers' Liability Act.

Congress was interested in remedying that whole picture. It wanted to give relief from such decisions of this Court as *Toledo, St. L. & W. R. vs. Allen*, 276 U. S. 165, and *Missouri P. & C. R. Co. vs. Aeby*, 275 U. S. 426, and the innumerable cases that had applied the pinpoint test to railroad employees in determining whether they were in interstate commerce or intrastate commerce and the back shop rule.

Every defect in the act was up for consideration and correction. Congress intended to provide adequate and similar protection for operating and non-operating employees. The statute was to be revised in every necessary aspect. As of 1939, the proclaimed value of state workmen's compensation acts had been demonstrated as false. The protection afforded had proven miserly and inadequate. The claimed certainty and speed of determination of claims under those statutes had been proven untrue. Men who lost legs or arms were being paid two or three thousand dollars and left to shift for themselves as industrial derelicts and undesirables. At the best, benevolent paternalism occasionally provided some make-shift job with no certainty of tenure or pay.

Seamen who had vigorously and successfully rejected and avoided inclusion within the Longshoremen's and Harbor Workers' Compensation Act had demonstrated their wisdom in so doing. The benefits of the *Jones Act*, 46 U. S. C. A. 688, plus the doctrine of seaworthiness, plus maintenance and cure had made them the best protected group of labor in the United States in industrial accident matters.

The English experience with their compensation acts had proven that compensations acts benefits were illusory and inadequate and just as dilatory in fruition. Today, England provides both. It has assured compensation, plus additional remedies on proof of negligence. *Halsbury's Laws of England*, Sec. 1318, 2d ed. 1940.

Hence, organized railroad labor did not permit itself in

1939 to be subjected to a compensation act in place of the Federal Employers' Liability Act. All that was needed was to amend and correct the evils so clearly, that for all times, no amount of ingenuity could induce the most restrictive judicial minds again to delimit the intended protection of the statute.

We of organized railroad labor of course knew all about *Nogueira vs. R. R.*, supra, and the deteriorating extent to which that case had been stretched in *Buren vs. S. P. Co.*, 50 F. 2d 407. We did not intend to lose an important segment of our membership, i. e. those railroaders who worked the tracks leading to and on floats, docks and wharves, if we could prevent it. We did not intend to permit legislative discrimination against that group in accident protection. They were and are part of us. One day they are on land, another on docks, wharves and floats and some of the time on both. Their work—that is the nature of their duties—is identical with the land stationed railroader. They, too, are land stationed railroaders. An incidence of the day's work takes one of the crew of five momentarily onto a float. As the record in *Zientek vs. Reading*, 93 F. S. 875, indicates, these men spend ninety-five per cent of their time on land. Four of the train crew of five men are on terra firma at the very instant that the other brakeman is on the float sustaining injury. Between the locomotive and the car on which the hind brakeman rides on to the float are the 'drifter' cars. They are empties which serve no purpose other than to provide adequate length to the train so that the end car can be pushed up to the end of the float track without the need of pushing the heavy locomotive onto the float too and possibly sinking or capsizing the whole works. Such fortuitous circumstance as which one of the two brakemen will act as hind man on that particular day makes one a longshoreman under this decision, and the other four men remain railroaders. How arbitrary and capricious can the law get? How unfair? The men are all one "crew",

one "team". Suddenly, they are four railroaders and one stevedore. Suppose out of ten cars, four were to put on a float. A brakeman gets on each end of the draft. Then the engine can approach the draft, to couple from either end. Dependent upon the end he fortuitously couples to, one brakeman remains a brakeman, the other presto! becomes a stevedore. Silly, isn't it? They throw switches, put on or release brakes, pass the same signals, operate under the same book of rules and are provided with the same benefits under the Railroad Retirement laws and the Railroad Labor Act, pay the same union dues and enjoy the same seniority privileges.

Hence, any such artificial wedge in our midst is as a hatchet in our skulls.

So, to be sure that all, including this bench would understand that we were taking all our brethren home with us, under the same roof and breaking the same bread, when the Act was microscopically examined before an enlightened and co-operative Congress in 1939, with the *Nogueira* case, supra, in mind, we successfully insisted that the words "boats, wharves and docks" remain or be reinserted in the Statute so that all would know that those of us whose duties sometimes took us over or onto navigable waters, would be protected by the Federal Employers' Liability Act. We had confidence that all courts and this one in the end would now administer this statute so that brakemen would be treated all alike and would be given the utmost of protection. We frankly lobbied in 1939 to attain the same end obtained by maritime labor in 1920.

Congress and this Court since Tiller vs. Atlantic Coast Line R. R. Co., in 318 U. S. 54, and the long line of cases that have since followed culminating with that masterful resume of Justice Douglas in Wilkerson vs. McCarthy, 336 U. S. 53, has indeed given railroaders the most complete and satisfactory protection they could ask.

As here and there a court below has deviated and per-

mitted the ugly defeatist head of assumption of risk or other squalid defenses to be raised by legerdemain reasoning, this Court has granted certiorari and vigorously and in no uncertain language reversed.

Certain grant of certiorari to employees in these cases is as vital to the protection of the employees as constant weeding is to the farmer or gardener. And those who complain thereof speaking in the lofty tones of the function of the Court, lose sight of the fact that in no field of law is there such rabbit like growth, of malignant theory determined to undermine congressional action as in work-sustained injury litigation. This Court has a duty of relentless supervision of this litigation, because of the unrelenting attacks on it on any basis from every conceivable angle or approach—too frequently in the false cloak of "benevolent understanding" or in the interest of the "welfare of the Court."

Hence, taking all things in their proper *chronological* order, the *last* word of Congress is to the effect that railroad employees including those whose work takes them occasionally on "boats, wharves or docks" are covered by the Federal Employers' Liability Act or the Jones Act.

To hold otherwise is to assume that the Congress which completely overhauled and rewrote the entire Federal Employers' Liability Act was ignorant, redundant and engaged in supercilious and meaningless legislating.

Else, when can an accident on a "boat" be within the Federal Employers' Liability Act or the Jones Act if the present decision in the instant case is to stand? All boats are on navigable waters. That is why they are boats—so that they may transport men, material and cars over the waters.

This Court may not so interpret the statute as to make the words "wharves, boats and docks" mere surplusage or oversight. Every word must have a meaning. If *Nogueira* was to have the twisted effect which some lower courts gave it and if Congress intended such to become the law of the land, then those words would not have been reinserted

in the *last* legislative directive in this field. *The words would have been deleted.*

This Court in its opinion today says: "Seamen preferred to take the risks of the Jones Act". That statute was bodily lifted from the Federal Employers' Liability Act to apply to seamen. We, too, thought we had expressed our preference likewise. What have seamen done that makes their position different from railroaders?

Even when this Court had before it the question whether a harborworker on a vessel came under the maritime law or the Longshoremen's and Harbor Workers' Compensation Act, in *Seas Shipping Co. Inc. vs. Sieracki*, 328 U. S. 85, it applied the test of "What is the nature of the work". As the court said in *Sieracki*, on page 99:

> "For these purposes he (longshoreman) is, in short, a seaman because he is doing a seaman's work and incurring seamen's hazards."

The court considered the effect of the *Longshoremen's and Harbor Workers' Compensation Act*, 33 U. S. C. A. 901, and held in that case that the obligation of the owner of the vessel was not nullified by that Statute. The court said at page 101:

> "In other words, it is claimed that the remedies afforded by the Longshoremen's legislation are exclusive of all other remedies for injuries incurred aboard ship, whether against the employer or others. *This view cannot be accepted.*" (Italics supplied.)

Inter alia, the court at page 96, also said:

> "Historically the work of loading and unloading is the work of the ship's service, performed until recently by members of the ship's crew. * * * That the owner seeks to have it done with the advantages of more mod-

ern divisions of labor does not minimize the worker's hazard and should not nullify his protection."

This court held the maritime duty of "seaworthiness" applied even to one who might otherwise have been classified as a longshoreman.

It was held there that a worker on a vessel, even a harborworker or a longshoreman, if doing a "seaman's" work when injured is entitled to the protection of the maritime law. It was directly held that the Longshoremen's and Harbor Workers' Compensation Act did not apply. It was a natural restatement of the law set forth in *International Stevedore Co. vs. Haverty*, 272 U. S. 50, where a stevedore was injured on a vessel, while doing seaman's normal duties; and it was held that he was entitled to the protection accorded to seamen.

In *Norton vs. Warner Co.*, 321 U. S. 565, Mr. Justice Douglas for an unanimous court held that a bargeman on a vessel having no motive power or steering force was nonetheless a "seaman" and entitled to the benefits of the Jones Act and that the Longshoremen's and Harbor Workers' Compensation Act did not apply to him.

The Court in that case recognized the superior advantages of the Jones Act over the Longshoremen's and Harbor Workers' Compensation Act. What has now changed that view? How is O'Rourke any less a seaman than Haverty or Rusin in *Norton vs. Warner*, supra, or Sieracki?

In *S. Chicago Coal & Dock Co. vs. Bassett*, 309 U. S. 251, this court likewise analyzed the "nature of the duty performed" in determining whether the liability of the employer was under the Jones Act or the Longshoremen's and Harbor Workers' Compensation Act. There, despite its holding in the *Haverty* case, supra, this court held that a Hohfeldian functional approach must be followed in interpreting the word "crew". Thus despite the holding in Haverty that one who "Loads and unloads" a vessel is none-

theless a "seaman" yet since his duties had naught to do with navigtation, in *Chicago Coal vs. Bassett* he was held not a "seaman" in determining the applicability of the Longshoremen's and Harbor Workers' Compensation Act. Yet, when Sieracki, supra, later came before the Court, in determining whether the employer of a longshoreman owed a duty of providing a "seaworthy" ship to him, this court held Sieracki, the longshoreman, to be again a "seaman" and entitled to such protection. Thus even though Sieracki, under the *Chicago Coal vs. Bassett* case could not have recovered under the Jones Act, since for that statute he was a longshoreman, and hence the Longshoremen's and Harbor Workers' Compensation Act had exclusive application, yet it held that Sieracki had a remedy providing absolute liability under "seaworthiness", as to which, like a chameleon, he had become again, a seaman.

Since, in the instant case, O'Rourke too claimed the protection of the Safety Appliance laws pertaining to brakes which provide absolute liability, on proof of causative violation, even unto non-employees such as the public and others (see *Fairport, P. & E. R. Co. vs. Meredith*, 292 U. S. 589), why did not this Court hold that O'Rourke was still properly before the U. S. District Court and jury on the issue of Safety Appliance Violations, even if the Federal Employers' Liability Act and Jones Act do not apply to him. Certainly the tracks on the float connecting up to the tracks of the carrier on the waterfront are part of its "lines". If a right of action exists to recover for a violation of the absolute duty that flows from "seaworthiness" even in the absence of the right to sue for negligence under the Jones Act, why, analogously, does not the same right exist for railroaders (O'Rourke) to recover for violation of the absolute duty created by the Safety Appliance Statutes, independently of whether there is a right to maintaining an action for negligence under the Federal Employers' Liability Act or Jones Act under the facts of this case?

As we can see, the United States Supreme Court has made a distinction between those who load and unload vessels, from those who are members of the crew and its functions and with those who bring a freight car on to the vessel for just a moment and are thereafter not to be considered as loaders and unloaders, but are in a class distinct and separate and easily discernible from those for whom this act was written and those whom it was intended to benefit.

At the time of the passage of the Longshoremen's and Harbor Workers' Compensation Act, in referring to the bill as it was ultimately concluded, Mr. Cummings, Chairman of the Senate Judiciary Committee, stated:

> "Section (3) of the bill described the persons to be brought within its terms with such exceptions as are necessary to limit the operation of the bill to such persons who are intended to be covered by it."

Referring to the preamble to discover who those persons may be, we find:

> "The purpose of the bill is to provide for compensation in the stead of liability for a class of employees known as 'longshoremen'. These men are *mainly* employed in loading, unloading, refitting and repairing ships * * * Longshoremen cannot avail themselves of the benefit of state laws because of the nature of their employment * * *. It thus appears that there is no way of giving to these hard-working men engaged in a somewhat hazardous employment the justice involved in the modern principle of compensation without enacting a uniform compensation statute." (Emphasis ours.) (Sen. Rep. 973, 69th Congress, First Session.)

From these words the implication arises that since railroad workers *did* have a recourse in the event that they

were injured, this Longshoremen's & Harbor Workers' Act would not have applied to railroad workers.

What the Congress was trying to do was provide compensation for a class of employees who had none previous to that time. Railroad workers were already covered by the Federal Employers' Liability Act. Therefore, it could not have been intended to include them in this Act.

Likewise, more recently in *Norton vs. Warner Co.*, 321 U. S. 565; 64 S. Ct. 747 (1944), quoting the same report by Mr. Cummings, the United States Supreme Court emphasized the same distinction between longshoremen, harbor workers and stevedores and seamen. It is clear that the plaintiff in our case was neither a longshoreman nor a harborworker within the purview of the Longshoremen's & Harbor Workers' Compensation Act.

The quotation just recited from the original report and from the *Norton* case, supra, was followed by the 3rd circuit in *Tucker vs. Branham*, 151 F. (2d) 96 (C. C. A. 3rd, 1945). In that case, Dillon was held to be a member of the crew even though among his duties it was conceded that, inter alia, "he had some duties with respect to loading and unloading of the vessel".

Indeed, the United States Supreme Court in *Sultan Railway Co. vs. Dept. of Labor*, 277 U. S. 135; 48 S. Ct. 505 (1928), said at page 137:

> "It is settled by our decisions that where the employment, although maritime in character, pertains to local matters having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity."

Moreover, in *Davis vs. Dept. of Labor*, 317 U. S. 249, at 256; 63 S. Ct. 225 (1942); the court stated:

"There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the State Compensation Act."

In that case, a structural steel worker was drowned in a navigable river and the lower court had rejected a claim filed under the Workmen's Compensation Law of the State with a view that the remedy was exclusively under the Harbor Workers' Act. A reading of the opinion of the United States Supreme Court reveals that the Workmen's Compensation Law of the state applied exclusively despite the accident on navigable waters.

In *Central Engineering Co., et al. vs. Bassett*, 42 F. Supp. (D. C. S. D. Ill. 1941) it was held that an engineering company's employee who was injured on a vessel in navigable waters was not engaged in maritime work and therefore not covered by the Harbor Workers' Act.

In the *Davis* case, supra, the United States Supreme court spoke of a "twilight zone" in which employees had their rights determined case by case and final determination was upon the circumstances of each. Since then, in *Moore's Case*, 80 N. E. (2d) 478, Chief Justice Qua of the Supreme Judicial Court of Massachusetts stated:

*"We are inclined to include within the twilight zone the case of a workman engaged in the ordinary land occupation although occasionally going on a dry dock or vessel to make repairs * * *"* (Emphasis supplied.)

He further states that the Massachusetts Court regarded the *Davis* case as a

"* * * revolutionary decision, deemed necessary to escape an intolerable situation as designed to include

within a wide circle of doubt all water front cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other. We can see no other manner in which the Davis case can be given the effect that we must suppose the court intended it should have, and we must assume that the court intends to follow that case in the future.".

In the *Bassett* case, supra, this court in interpreting this statute stated, at page 260, the test as follows: "The question (crew) concerns his actual duties". Why, then, did this court in the instant case in determining which statute applied not limit itself to that test? Why, for the first time, did it now state the test to be, "Is this an accident on navigable waters sustained by one in the employ of an employer who has any employee engaged in maritime service"?

If one follows the clear course of the previously decided cases, this decision is today erroneous. Only by shifting the emphasis to the sometimes maritime character of the master's service can the present result be reached.

If the nature of the employers business is to be considered as the test, then this employer is at least in the maritime business, if not in the railroad business. Certainly the railroad is not in the stevedoring or longshoreman's business.

At least O'Rourke is under the Jones Act, 46 U. S. C. A. 688 *if not under the Federal Employers' Liability Act*, 45 U. S. C. A. 51. No stipulation of counsel can change that! This Court cannot be stultified by stipulations of law, erroneously ignoring a jurisdictional federal statute.

Under no stretch of the imagination can O'Rourke be made out a longshoreman.

The majority opinion in the case at hand, in the closing paragraphs reviewed a series of cases of non-maritime em-

ployment in which it had been held the employee was covered by the Longshoremen's and Harbor Workers' Compensation Act. In all of those cases the court had to place the employee either under the Longshoremen's and Harbor Workers' Compensation Act or a local Workmen's Compensation Act. They did not present a decision between the several federal statutes. Because some of the employees worked and the particular accident occurred on the navigable waters of the United States it naturally was held in those cases that the federal legislation had supersedence. That was because Congress had legislated in that field of interstate commerce. But as between three federal statutes where the employer has some of its functions performed in the maritime field and over the navigable waters of the United States, it is nonetheless ridiculous to hold that in *every* accident which occurs over navigable waters, that, per se, it is the Longshoremen's and Harbor Workers' Compensation Act that applies. *Rather, once the locus of the accident is shown to have been over navigable waters, then the character of the employee's general work is the determinant.* Let us take the employer in question. The Pennsylvania Railroad Company has some employees whose work is entirely on land, others entirely on navigable waters and some on both. The maritime aspect is by far the smallest part of its business. Does this make the Pennsylvania Railroad a longshore or stevedoring company? Does this make its railroaders longshoremen? Does this make its employees who ride its floats across the rivers of the United States harborworkers rather than seamen or railroaders? Is not the test, "what is the general nature of the particular employee's every day work?" Did not Congress give us the answer by the Amendment of 1939 (the last statement of Congress) in which it said that the general character of the employee's work is to be considered, not what he was doing at the instant of the accident? Are these railroaders to be deprived of the intended coverage of the Federal Employers'

Liability Act and the Jones Act because of a misunderstanding of the position of the Longshoremen's and Harbor Workers' Compensation Act in the federal master and servant relationship within the several federal laws intended to cover each according to his labor?

All that Congress has done is this. Railroaders and seamen in interstate commerce had been covered by the Federal Employers' Liability Act and Jones Act. Others, such as longshoremen and harbor workers on the navigable waters of the United States were placed under federal supervision by other legislation specially written for them so as to provide uniformity of protection for *that* group throughout the United States. Each class of employment to its own statute. Nowhere and never did Congress intend the Longshoremen's and Harbor Workers' Compensation Act to encroach on the other already covered and protected groups,—the railroader and seamen. Only because *Nogueira* was a *longshoreman* on navigable waters did this Court extend the coverage of the Longshoremen's and Harbor Workers' Compensation Act to him rather than leave him to the New York Workmen's Compensation Act. That case merely holds that when Congress in a field in which it has supremacy, had spoken, then the federal remedy became exclusive. That case occurred before the Amendment of 1939 to the Federal Employers' Liability Act that removed the pinpoint test of interstate commerce. Hence, since *Nogueira* was either to be paid under New York Workmen's Compensation Act or the Harborworkers and Longshoremen's Act. Since Congress had legislated as to harborworkers, and that employee was then doing typical longshoreman's work, the New York Statute did not apply and the federal statute did.

From that case limited to its own facts, all too willing courts proceeded to extend the Longshoremen's and Harbor Workers' Compensation Act to employments already covered by the Federal Employers' Liability Act and the Jones Act. Unfounded rulings like *Buren vs. S. P. Co.*, 50 F. 2d

407, proliferated the Federal Employers' Liability Act. The mere locus of the accident over water, was there unwarrantedly held to change a railroader into a longshoreman. At the most, he might have become a seaman.

Judge Welsh in *Zientek vs. Reading Co.*, 93 F. S. 875, knocked the *Buren* decision into a cocked hat and literally demonstrated its unsoundness. The legislative history of the Federal Employers' Liability Act in 1939, should remove all doubt of the present state of the law and which federal statute should apply in each instance, dependent upon the nature of the labor being employed, plus its locus and whether regularly or minimally. As to a railroad brakeman, the locus can only enlarge the applicable statutes to a choice between the Federal Employers' Liability Act and the Jones Act.

The decision today of the Court in this case is, therefore, all the more puzzling. It is impossible in logic and reason to join in the opinion in *Sieracki*, to cite with approval the *Haverty* case, to write the opinion in *Norton vs. Warner*, supra, to express the liberal sentiments found in the opinion in *Bailey vs. Central Vt. Ry.*, 319 U. S. 350, and *Wilkerson vs. McCarthy*, 336 U. S. 53, and yet join in the majority opinion of the Court in the instant case. It taxes our minds and our hearts to understand how one today can write the dissenting opinion in *S. Buffalo R. Co. vs. Ahern* (1-19-53) and express such high humanitarian sentiments * for which we too vainly heretofore ourselves argued in this Court in our petition for leave to intervene, amici curiae pro petition for certiorari in *Heagney vs. Eastern District Terminal*, 190 F. 2d 976, 342 U. S. 920, and yet, on the same day, abandon the same hapless brakeman who by chance is the one man of the whole train crew who for a few plighted moments must ride the draft onto the float to set a brake and make the cut. Such is O'Rourke, and Zientek and Gussie and

* The plea for the adoption of the Brandeis view of the FELA coverage in **N. Y. C. R. R. v. Winfield**, 244 U. S. 147.

Job and the other brakemen who instante are metamorphosized into stevedores—and lose arms and legs and life itself and are compensated at $15.00 or $20.00 or $25.00 a week for several hundred weeks, and then literally starve and are forgotten. We do not hesitate for a moment to say that the case as argued and pleaded before the Court, failed to bring to the attention of the Court, the applicability of the Jones Act, if the locus of the accident over navigable waters has its touted significance at all.

The Longshoremen's and Harbor Workers' Compensation Act is one of bondage. It is cheap, inequitable and literally non-compensatory for the losses suffered. Written just after the First World War, it is an affront to intelligent and self respecting men in these times. Particularly is this so to men in such highly regarded employment as railroading. To reduce railroaders to that status and its concomitant chains and pressures, can be done and should be done only by Congress in clear, specific language. It should be done only by elected representatives of the people who must face the electorate to explain this demotion. It should not be done by judicial fiat.

If there are any among those who joined in this majority opinion who believe that railroaders in the petitioner's category are being helped by the alleged "assured and * * * prompt and certain recovery * * *" of the Longshoremen's and Harbor Workers' Compensation Act, let them be disillusioned of such thoughts.

There is no compensation statute in federal or state laws worth a tinker's dam. If the bleeding hearts which recently have given verbal vent in the American Bar Association articles and elsewhere to expressions of grief over the unfortunate lot of railroaders and seamen in not having a compensation act to provide for them in work sustained accidents, would only inform themselves of the actual facts, then those tears would cease and they would let well enough alone (if those tears are sincere).

An intelligent appraisal with a view toward helping railroad employees attain the maximum protection cannot be gained by reading and accepting the conclusions of the Railroad Retirement Board, Work Injuries in the Railroad Industry, 1938-40 (1947). For an up to date, scientific evaluation, see *Federal Employers' Liability Act—a Real compensatory Law for Railroad Workers*, by B. Nathaniel Richter and Lois G. Forer, Esqs., 36 Cornell L. Q. 203 (1952).

The statistics produced by the Railroad Retirement Board were predicated entirely upon cases which occurred before the Amendments of 1939 were enacted. Hence, there were so many cases lost. Today, more than 95% of all injured railroaders recover for their injuries at work. And the recoveries are so much greater and truly realistic, that the railroad companies now lobby for passage of a compensation act, to reduce that protection. Those who truly wish to improve the railroaders lot should familiarize themselves with the opinion of the late Mr. Justice Brandeis in *New York Central R. Co. vs. Winfield*, 244 U. S. 147, where he tried to have the court hold that railroad employees have both the protection of the local compensation act plus the right of additional recovery under the Federal Employers' Liability Act upon a showing of negligence. Thus would the railroad industry provide true protection for its men. We would then approximate what the English have universally accomplished in their industries without regard to inter or intrastate employment.

If we cannot have both—do not wrench from us what we have attained after so much effort and pleading and suffering.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 60.

THE PENNSYLVANIA RAILROAD COMPANY,

Petitioner,

against

CHARLES E. O'ROURKE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

OBJECTION AND REPLY TO PETITION AND BRIEF, *AMICI CURIAE*, OF ORDER OF RAILWAY CONDUCTORS PENNSYLVANIA RAILROAD LINES EAST, ETC.

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To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Although couched in language that might indicate that the said petition and brief were submitted pursuant to the authority of the labor movement of the country, they are in fact submitted by three local unions, the employer of one of which, the Hudson & Manhattan Railroad, we are informed does not own or operate car floats or any floating equipment. Two of the three purport to represent locomotive engineers whose duties admittedly do not require them to go on board car floats (*Amici Curiae* Brief,[1]

[1] As a matter of convenience, the "Petition and Brief, Amici Curiae, of Order of Railway Conductors, Pennsylvania Railroad Lines East", etc., is herein referred to as "*amici curiae* brief" and the parties thereto as "*amici curiae*".

pp. 4, 16) and the other, the Order of Railway Conductors, Pennsylvania Railroad Lines East, having lost the representation election held by the National Mediation Board, is no longer the duly certified and accredited representative of the employees, and has not been such a representative since September 16, 1942. Accordingly, the proposed *amici curiae* are not within the Rules of this Court (Rule 27(9)(c)).

Furthermore, they have not complied with the rules of this Court (Rule 27 (9) (a) and (b)). No claim is made that either of the parties to the case were asked to consent to the filing of a brief *amici curiae* promptly after the granting of certiorari. They were not even so requested prior to or upon the argument on the merits. Such a timely request, we would not have opposed. The railroad company filed its petition for a writ of certiorari on May 12, 1952 and this Court granted the writ on October 13, 1952 (344 U. S. 811). The case was argued on the merits on December 8, 1952, and on January 12, 1953, this Court handed down its decision (—— U. S. ——, 73 S. Ct. 302) reversing the decision of the Court of Appeals (194 F. 2d 612; R. 48). On January 23, 1953, the railroad company was served by respondent with a copy of a petition for rehearing and on January 30, 1953, responded thereto. On January 30, 1953, we received in the mail two copies of the *amici curiae* brief. On February 4, 1953, we were asked to consent to the request of the *amici curiae* to intervene. See Rules of the Supreme Court of the United States, Rule 27 (9) (a), (b), (c). Moreover, the petition and brief (pp. 1, 4) show clearly that the proposed *amici curiae* have been keeping in touch with labor decisions. No claim is made that they were not familiar with each step taken in this action. No excuse is given for their delay.

The said brief states categorically that O'Rourke was certainly a railroader and, therefore, not covered by the

Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 33 U. S. C. § 901, *et seq.*), or, if not, that he was definitely a seaman entitled to sue under the Jones Act (41 Stat. 988, 46 U. S. C. § 688).

The argument that O'Rourke was a seaman and covered by the Jones Act, it is said (p. 13), was first raised in the *amici curiae* brief. The argument necessarily is that O'Rourke was a member of the ship's crew, was thereby excluded from the coverage of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. § 903(a)(1)), and was entitled to the benefits of the Jones Act (see *Norton* v. *Warner*, 321 U. S. 565). By no stretch of the imagination can this employee be deemed a member of the vessel's crew. The undisputed fact was the subject of a stipulation. It was agreed that he was not (R. 37, 39). If the *amici curiae* desire to litigate the question as to which railroad employees may fall within the classification of members of a ship's crew, then that will have to be litigated in an action in which that question is at issue. Here it is stipulated that it is not. It thus appears that the one question raised by the said brief which, it is said, was not heretofore argued in this cause was excluded by stipulation, and is wholly without merit.

The question, whether operating car floats and loading or unloading freight cars therefrom while the floats are moored in navigable waters is railroad employment or maritime employment, has been considered at length (our Brief, pp. 7-11, 14-15; Respondent's Brief, pp. 4-10, 12).

In an attempt to avoid the decision of this Court in the *Nogueira* case,[2] the *amici curiae* seem to indicate that, by the 1939 amendment to the Federal Employers' Liability Act, they had caused something to be done to the phrase "boats, wharves, or other equipment"[3] misquoted in the said brief (pp. 4, 5 and 6). It is intimated that there was

[2] *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128.

[3] Sec. 1 of Federal Employers' Liability Act (45 U. S. C. § 51).

some tampering with the said words. Nothing could be farther from the fact. The representations with respect to the 1939 amendment* were made to Congress by the National Brotherhoods and the American Federation of Labor (Senate Judiciary Sub-Committee Hearings, 76th Congress, 1st Session, March 28, 29, 1939). We do not find that the said words were considered or even mentioned during the course of Congressional consideration of the said amendment, except, of course, in setting forth the text of the first paragraph of Section 1 of the Federal Employers' Liability Act (45 U. S. C. § 51). The language of Section 1 of the Act does not contain a single change from the form in which that paragraph was originally enacted, and which was the subject matter of consideration by this Court in its decision in the *Nogueira* case (281 U. S. 128, 133) and in this case (—— U. S. ——; 73 S. Ct. 302, 304), but there was added to that section the amendment quoted and discussed in our main brief (pp. 11 and 12; footnote 4). It was there also pointed out that the employee here involved was directly engaged in interstate commerce and accordingly the amendment did not affect his status (see also our Brief, footnote 5, p. 12), and that the case cited in the *amici curiae* brief, *Zientek* v. *Reading Co.*, 93 F. Supp. 875 (E. D. Pa.), has not been followed. (See *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, and other cases cited, our Brief, p. 12.) The effect of the 1939 amendment was argued in this cause in the District Court (R. 40, 41-43), mentioned in both the majority opinion (R. 48, 51) and dissenting opinion (R. 53) in the Court of Appeals, and considered in this Court (—— U. S. ——, 73 S. Ct. 302, 306, note 6).

With the exception of the argument as to applicability of the Jones Act, which has been shown to be wholly without merit, the said *amici curiae* petition and brief presents

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* Sec. 1 of Federal Employers' Liability Act (35 Stat. 65, as amended, 53 Stat. 1404; 45 U. S. C. § 51).

no new arguments that had not been heretofore urged,[5] cites no case relevant to the issues not heretofore presented to this Court for its consideration,[6] and asserts no changes of law or fact occurring since the decision herein.

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[5] The problem of the twilight zone has been heretofore fully argued and treated in the considered judgment of this Court (our Brief, pp. 12-14; —— U. S. ——, 73 S. Ct. 302, 306, note 8).

The question as to the effect of the Safety Appliance Act was likewise discussed in the respondent's brief, pp. 4, 6, 10, 11, 12.

If some of the laborers who preferred the Longshoremen's and Harbor Workers' Compensation Act in 1927 have changed their minds with the changes in the times, as the *amici curiae* state (compare p. 2 of their brief with pp. 3 and 4), and now prefer some other method of protection, their desire should be made known to Congress. It is obviously immaterial in a judicial determination of the coverage of the Act, notwithstanding the number of pages devoted to it (*Amici Curiae* Brief, pp. 2, 3, 4, 5, 7, 16, 17, 18).

[6] The following decisions were cited by the parties to this proceeding and have been before this Court for its consideration: *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128 (*Amici* Brief, pp. 2, 4, our Brief, pp. 8, 9, 11, 12, 14, 15, 16, Respondent's Brief, pp. 5, 7, 10, 12), *Buren* v. *Southern Pacific Co.*, 50 F. 2d 407 (9th Cir.), *cert. denied* 284 U. S. 638 (*Amici* Brief, pp. 4, 15, our Brief, p. 10), *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (*Amici* Brief, p. 2, our Brief, pp. 7, 14, Respondent's Brief, pp. 5, 6, 12), *Davis* v. *Department of Labor*, 317 U. S. 249 (*Amici* Brief, pp. 11, 12, our Brief, pp. 12, 13), *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U. S. 85 (*Amici* Brief, p. 7, Respondent's Brief, pp. 10, 12), *Sultan Ry. & Timber Co.* v. *Department of Labor*, 277 U. S. 135 (*Amici* Brief, p. 11, our Brief, p. 13), *Zientek* v. *Redding Co.*, 93 F. Supp. 875 (*Amici* Brief, pp. 4, 16, our Brief, pp. 11, 12), *Bethlehem Steel Co.* v. *Moores*, 335 U. S. 874 (cited in *Amici* Brief, p. 12, *sub nom. Moores* Case, 80 N. E. 2d 478, our Brief, pp. 13, 14), *Norton* v. *Warner Co.*, 321 U. S. 565 (*Amici* Brief, pp. 8, 11, 16, Respondent's Brief, pp. 5, 6) and *South Chicago Coal and Dock Co.* v. *Bassett*, 309 U. S. 251 (*Amici* Brief, pp. 8, 9, Respondent's Brief, pp. 8, 9). *Central Engineering Co.* v. *Bassett*, 42 F. Supp. 750 (S. D. Ill.) (*Amici* Brief, p. 12), held that an employer engineering company engaged in the construction of a dam and lock was not "engaged in maritime work" within the meaning of the Compensation Act. Other decisions cited in the *Amici Curiae* Brief are not relevant to a decision of the issues here involved.

Nevertheless, the said petition and brief demands that this Court overrule the *Nogueira* case and reverse its own recently rendered decision in this action.

It is respectfully submitted that the *amici curiae* application should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 60.

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

against

CHARLES E. O'ROURKE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit
(January 12, 1953)

PETITION FOR REHEARING

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GROUNDS FOR REHEARING

The Court's decision disregards the constant and established intent of Congress to enact those remedial statutes most reasonably beneficial to injured employees; whereas in the past this Court has constantly given such statutes liberal construction.

Congress enacted the *Federal Employers' Liability Act*, 45 U. S. C. A. Sec. 51 et seq., the *Safety Appliance Acts*, 45 U. S. C. A. Sec. 1 et seq., and the *Longshoremen's and Harbor Workers' Compensation Act*, 33 U. S. C. A. Sec. 901 et seq., for the benefit of injured employees and as a deterrent against the use of unsafe equipment and unsafe methods.

Operational railroading is an employment which is dangerous and hazardous. This is particularly true of the work of a brakeman, which was the respondent's occupation here. This Court has constantly recognized this situation and has always liberally construed those Acts pertinent to the business of railroading. See *Urie* v. *Thompson*, 337 U. S. 163, 181-182 and *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481, 486. By its decision in this case the Court has now replaced, for a large body of railroaders, the substantial benefits of the Liability Act with the comparatively meager benefits of the Compensation Act. Mute evidence of the comparative benefits involved is the strong opposition interposed by the petitioner to the claim herein.

Perhaps more important is the fact that as a result of the decision herein the Safety Appliance Acts no longer are applicable to cars and equipment over navigable waters. When it is contemplated that the deterrent factor represented by these Acts is thus nullified the effect is startling indeed. It will make the already dangerous occupation of railroading even more fortuitous. Such a result is difficult to reconcile with the adamant position taken by the Court in regard to the comprehensive applicability of the Safety Appliance Acts in *Coray* v. *Southern Pac. Co.*, 335 U. S. 520.

That this Court has had the welfare and benefit of the injured employee constantly in mind, in reasonably interpreting the intent of Congress, is further evidenced by the result in *Davis* v. *Department of Labor*, 317 U. S. 249, *Bethlehem Steel Company* v. *Moore*, 335 U. S. 874, and *Kaiser Company* v. *Baskin*, 340 U. S. 886. In those cases, involving an apparent overlapping of federal and state compensation laws the Court recognized a twilight zone "whereby a reasonable argument can be made either way, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other." *Moore's Case*, 80 N. E. 2d at 484.

affirmed 335 U. S. 874. In effect the injured workman in this twilight zone may recover under either state or federal compensation law, regardless of the fact that he was injured over navigable waters. The obvious advantage being that he can choose that remedy which is most beneficial to him.

In the present case the Court holds that a line can be drawn marking the coverage between the federal acts involved. The clear inference is that this line is the geographical shoreline separating land from navigable waters. It would have been just as clear and as convenient for the Court to have used the same test in the *Davis* line of cases. It chose to hold that there was a twilight zone of employment and "recognized the futility of attempting to reason logically about 'illogic'." *Moore's Case*, supra. In this case too there is a twilight zone, for "a reasonable argument can be made either way" in regard to whether moving loaded (or unloaded) freight cars from a float is the employer's maritime employment or its railroad employment, no consideration being given to the employee's actual duties in relation thereto. The sole reason for existence of the car float is the transportation of railroad cars in interstate commerce. Once the car float is moored it has fulfilled its purpose—the employer's maritime service. The movement of the cars off the float is then the railroad employment of the employer. Though opinions may differ this is, at the very least, a reasonable argument.

For these reasons it is urged that respondent (petitioner herein) be granted a rehearing in order to present his argument that a twilight zone exists in this type of case as in the *Davis* line of cases; and that the interests of justice and the intent of Congress will best be served by affording this employee his choice of remedies. Of the thirteen jurists who have passed on this case since its inception in the District Court, seven have decided one way and six the other. This sharp division of opinion itself supports respondent's contention herein that a twilight zone does in fact exist in this and similar cases.

Certificate of Counsel

Counsel for respondent (petitioner herein) certify that the within petition for rehearing is presented in good faith and not for delay.

Respectfully submitted,

RICHARD C. MACHCINSKI,
HERBERT ZELENKO,
Attorneys for Respondent.

New York, N. Y. January 23, 1953.